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## **Investigation, Process and Legal Standards within the Criminal Justice System in Kuwait**

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# Investigation, Process and Legal Standards within the Criminal Justice System in Kuwait

Forensic Investigation from Crime Scene to Courtroom



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Forensic Investigation from Crime Scene to Courtroom



Report prepared by School of Law, Queen's University Belfast in conjunction with KILRC - May 2016

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## Executive Summary

- This research project was commissioned by KILRC in light of perceived failures in securing reliable prosecutions within the criminal justice system as a result of difficulties in securing the integrity of the evidence chain from crime scene to courtroom.
- The purpose of the study is to identify issues within criminal investigation and law enforcement where forensic evidence is brought forward and to make recommendations that would assist process and procedural alignment and compliance with international best practice.
- The research was carried out by teams from The Queen's University of Belfast and the Kuwait International Legal Research Centre. There are three major elements: firstly, a series of challenges were identified. Secondly, international best practice standards in the area of criminal process and human rights have been identified and collated. Thirdly, the operation of aspects of the criminal justice system in Kuwait was examined through a literature review, and via a number of semi-structured interviews with key informants identified by the KILRC team. A number of platform scenarios were developed in a critical incident technique to bring out elements of practice.
- The report was developed in an iterative process between the QUB team and the KILRC experts.
- A review of Kuwait's domestic and international obligations confirms a commitment to best practice in the criminal justice system, across seven headings covering the criminal process.
- Investigation of the operation of the criminal justice system in action reveals some good practice but also a significant gap between international best practice and the delivery of reliable evidence in support of the court system.
- The following recommendations are made:

### Recommendation No. 1

While many of the principles of best practice are given expression directly within the constitution and law of Kuwait consideration should be given to developing and consolidating these standards within a specially codified instrument which sets out the key principles in legislation and is supported by codes of practice.

### Recommendation No. 2

In keeping with the majority of international practice, develop a corporate approach to criminal investigation by amalgamating all investigatory, police, forensic practitioner and scientific activities under one Ministry.

### Recommendation No. 3

Develop and implement common and agreed

Standard Operating Procedural protocols to guide all crime investigation and forensic practitioner activities from the initial crime scene to the court prosecution.

### Recommendation No. 4

Develop a team approach to evidence management through a compulsory general training programme and competency assessment regime that recognises the role of each individual within the criminal justice system and ensures that everyone is fully aware of and trained for their role in securing the evidence chain.

### Recommendation No. 5

A suitable specialist training programme should be developed for all those involved in the crime scene processes to ensure they are trained to an appropriate level in managing a crime scene and

assessed as competent in their role. Training should be practical and scenario based and be effectively assessed. Only those who have met the success requirements should be used in the specified roles.

#### **Recommendation No. 6**

The police hierarchy must take steps to ensure that the first police responder of whatever rank or service responding to an incident has the knowledge, capability and authority to put in place agreed duties and procedures, and has the skills, knowledge and authority to maintain integrity of the evidence.

#### **Recommendation No. 7**

An agreed crime scene logging process and protocol to be used at all crime scenes must be developed and suitable training put in place to ensure that is developed in every case.

#### **Recommendation No. 8**

In order to develop effective management of evidence thorough the whole investigatory process Quality Performance and Standard Operating

manuals should be produced detailing all relevant protocols required to guard the integrity of the evidence gathering, storage and transport. Appropriate training should be introduced to ensure these protocols become mainstreamed through the whole process.

#### **Recommendation No. 9**

Ensure that any new forensic facility design is proactively focused on compliance with the associated ISO standards and has sufficient IT infrastructure to accommodate an evidence administration system, and that the competency of forensic scientists is at an acceptable level and continued with mandatory personal development.

#### **Recommendation No. 10**

Appropriate awareness training should be provided to prosecutors, defence lawyers and judges to ensure a degree of 'forensic literacy' which will enable good practice to be recognised and poor attainment in evidence management to be identified and challenged.

# 1. Introduction, Scope and Methods

This part of the report details the origins, scope, and methodology of the project.

## 1.1 Overview

The research project that informs this report was designed to enquire into Kuwait law enforcement forensic related investigatory practices within the prosecution agencies and the wider criminal justice community. This phase is a scoping study intended to inform further targeted and in-depth research.

At the core of this phase of the research is a comparative study setting out the best practice norms in the United Kingdom and beyond and measuring the impact, effectiveness and compliance of Kuwait's forensic related criminal investigatory practices against these standards.

## 1.2 Research Need

The research need was initially identified during discussions between Dr. Bader Al Khuliffa, PhD BSc, the then Director of the Kuwait International Legal Research Centre (KILRC), and current Chairman of the Board of Trustees, Kuwait International Law School (KILAW) Kuwait. It was then scoped in detail through extensive discussions with Dr. Bader Al Khuliffa, Professor Mohammad AIMogatei, LLB PhD President and Dean of Kuwait International Law School (KILAW), Professor John Morison, LLB, PhD, MRIA, Professor of Jurisprudence, School of Law, The Queens University of Belfast (QUB) and Mr. Brian Grimshaw, MEd. MSc. FCMI, Visiting Research Fellow, the School of Law, QUB.

During these discussions it was reported that concern had been expressed by members of the Kuwait Government and by those in the wider legal and academic community that the administration of justice in Kuwait, and in particular the areas relating to forensic evidence and crime scene processes, were in need of strengthening.

## 1.3 Research Purpose

In light of this the study was designed to identify areas within the criminal investigation system that rely on forensic evidence, examine their operation and make recommendations that would assist the alignment of processes and procedures with international best practice.

The key elements of this involve:

- Identifying the range of international best practice sources in criminal justice and human rights
- Outlining seven key areas which these standards address
- Distilling the various best practice standards into a range of principles applying in each key area
- Drilling into current practices across primary use organisations in Kuwait, e.g, Courts, Police, Forensic Department etc. in order to gain a sense of their alignment with best practice standards
- Providing an initial identification of the levels of cooperation and process alignment between those Kuwait agencies tasked with the investigation of crime
- Developing (in conjunction with the KILRC team) an outline of relevant and culturally sensitive legal benchmarks
- Producing a list of prioritised remedial recommendations

It was agreed at the outset that this Phase 1 scoping study would not include:

a) A review of the capabilities or practices of the Kuwait Forensic Department Laboratories. (It is



understood that the Department is in the process of commissioning the development of a new facility and will then seek accreditation from the International Standards Organisation in order to ensure compliance with international industry best practice.)

b) An in-depth review of Kuwait legislation or its application, other than to comment on its impact on current crime scene to court forensic evidence practice.

#### **1.4 Research Approach and Management**

The research adopted a collaborative approach drawing on the national legal knowledge resident within the KILRC team, and the international subject matter knowledge of the QUB team. The QUB team was led by Professor John Morison with Mr Brian Grimshaw and it included Professor Sally Wheeler and a number of other experts within the Law School, including particularly Dr Hannah Russell. The KILRC team included Prof. Osama AlFouli, Dr Ahmed Alfaresi and Dr Eiman Alqattan. Prof Roger Burridge Emeritus, Warwick University provided valuable co-ordination between the teams.

#### **1.5 Research Methodology**

Research methodology focused primarily on a review of relevant literature, some analysis of quantitative material and a qualitative element to enhance rigor and validity. Methods included:

The identification of key challenges to the criminal justice system by KILRC researchers

A literature review of Kuwait, UK and international treaties, conventions, legislation, case law, procedures and protocols

Semi-structured interviews with key stakeholders identified by the KILRC Team.

Critical Incident Technique; a number of platform scenarios were developed to focus and guide a number of the semi-structured interviews. This approach also assisted in establishing a triangulation of findings. Scenario outlines are attached at Annex 'A'

Research ethics approval was obtained from the School of Law, Queen's University Research Ethics Approval process.

#### **1.5.1 Research Population**

Participants for the research were identified largely by the KILRC team and drawn from the following participant groups:

- Police Officers – Commissioned Ranks. (Non-commissioned ranks were not included in the investigation at this stage.)
- Police Crime Scene Investigators
- Prosecutors/Investigators
  - Misdemeanour (Ministry of the Interior) and Causation (Department of Justice). Both male and female operational prosecutors/ investigators were interviewed.
- Senior Prosecutors/Investigators, Heads of Specialist Departments
- Judges
- Defence solicitors
- Forensic specialists
- Retired personnel from each of the above groups. Representatives from these groups were identified by the KILRC team.

#### **1.5.2 Authorship of report**

The report was written by Professor John Morison and Mr Brian Grimshaw with input from the KILRC team.

## 2. Challenges for Kuwaiti Criminal Justice

The KILRC team identified a number of particular challenges for the criminal justice system through a series of discussions with key informants within all aspects of the system. These informed the research and provided important direction for the research project.

### 2.1 General Challenges

Based on a review of the system informed by discussion with practitioners the KILRC team identified the following challenges of a general nature.

- There is no principled and coherent structure for the Kuwait criminal justice system (CJ). Elements of civil law process are evident alongside common law adversarial practices: Important elements of either inquisitorial or adversarial processes are absent, such as the judicial oversight of prosecutions and the adversarial insistence upon onus and burden of proof, or the doctrine of precedent. Moreover, prosecutors appeared not to fully understand their role during the trial process.
- Absence of centralised authority and governance of Kuwait CJ prevents policy formation and strategic development. As a result it is more heavily dependent upon judicial supervision, but there is no guidance on how this should be achieved.
- There is a lack of professional regulation, standards, and programs of training for officials.
- There is an inconsistent and inadequate system for the recording and publication of decisions of the Court of Cassation.
- The separation of investigative powers between police/investigators and general prosecutors is inefficient and ineffective.
- There is a relative absence of criminal procedure (legislation) in Kuwait compared to UK and US. Where there is no legal rule, administrative norms and judicial guidance evolve into systemic custom and received practice.
- Codes of practice for the investigation of crime are urgently required (arrest, questioning, search, detention etc.) but principles and rules of evidence relating to confessions, exclusion, admissibility and the onus, burden and standard of proof are also necessary.
- There is an imbalance in the resources and competences of police, investigators and prosecutors. A review of entry qualifications and training needs is urgently required, along with continuing professional development.

### 2.2 Specific Challenges

Looking particularly at the legislative context the KILRC team identified a number of further, specific challenges. These included the following issues.

- There are vague provisions authorizing intervention (search) 'for the purpose of seizing things used in crime.... wherever necessary for the benefit of the investigation, and in the absence of any other means' (Art 80).
- Imprecise and inconsistent terminology e.g. Art 84 'solid evidence' necessary to justify searching persons found during search of property.
- No requirement to issue caution before questioning a suspect.
- No requirement to record interviews with suspect/defendant, Significant allegations of bad practice in and writing selective accounts of suspect's/defendant's statement.
- Unnecessary and unwieldy restrictions upon enforcement – e.g. no searching of residences during the night (Art 85) .
- Unwieldy bureaucratic provisions hindering effective enforcement – e.g. investigator may not authorize others to read mail but has to obtain order from the mail office (Art 87).
- Investigator's powers of search are apparently very wide and little oversight of the process. Art 77 authorizes an Investigator to issue a search warrant 'if enough evidence and presumptions are made available'.

### 3. A Summary of Criminal Justice and International Best Practice: An Example for Kuwait

This part of the report provides an overview of international best practice relevant to the operation of the criminal justice process in Kuwait.

#### 3.1 Introduction and Context

The concept of human rights and best practice and its extension to the criminal justice system is familiar in Kuwait. The Constitution of Kuwait 1962 recognises the right to equality,<sup>1</sup> right to liberty,<sup>2</sup> freedom from torture<sup>3</sup> and right to a fair trial<sup>4</sup>. Through its ratification of the International Covenant on Civil and Political Rights 1966 (ICCPR) and the Arab Charter on Human Rights 2004 (Arab Charter), Kuwait is also bound by these constitutional rights and the obligation to protect procedural fairness. Direct effect has been given to the ICCPR since 26 August 1996<sup>5</sup> and to the Arab Charter since 9 May 2013<sup>6</sup> as confirmed by Article 70 of the Constitution:

1) The Amir concludes treaties by decree and transmits them immediately to the National Assembly with the appropriate statement. A treaty has the force of law after it is signed, ratified, and published in the Official Gazette.

Furthermore, Kuwait's Government has stressed that 'Kuwait's accession to the International Covenant on Civil and Political Rights is a concrete indication of the depth of its concern with human rights issues'.<sup>7</sup> A variety of procedural rights at the trial stage are also protected

within Kuwait's Law No 16 Penal Code 1960 and its Law No 17 Penal Proceedings and Trials Code 1960.

The purpose of this section of the research report is to confirm Kuwait's domestic and international obligations concerning its criminal justice system and to set out a summary of the extent of these best practice standards.

#### 3.2 Best practice standards in context

The best practice standards can be mapped across the following areas:

- 1) general conduct
- 2) establishment of criminal laws
- 3) initial investigations
- 4) powers of arrest
- 5) detention
- 6) scrutiny of the authorities
- 7) trial proceedings

The key principles of international best practice are drawn from:

- the European Convention on Human Rights 1950
- the International Covenant on Civil and Political Rights 1966 (ICCPR)
- the United Nations' (UN) Code of Conduct for Law Enforcement Officials 1979 (Code of Conduct 1979)
- the United Kingdom (UK)'s Police and Criminal Evidence Act 1984 (PACE) and its Codes of Practice
- the UN's Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions 1989 (1989 Principles)
- the UN's Model Protocol for a Legal Investigation of Extra Legal, Arbitrary and Summary Executions 1991 (Minnesota Protocol)
- and the UK's Regulation of Investigatory Powers Act 2000 (RIPA).

<sup>1</sup> Article 29, Constitution of Kuwait 1962.

<sup>2</sup> Article 29, Constitution of Kuwait 1962.

<sup>3</sup> Article 31, Constitution of Kuwait 1962.

<sup>4</sup> Article 34, Constitution of Kuwait 1962.

<sup>5</sup> CCPR/C/120/Add.1, 'Initial Report of State Parties Due in 1997: Kuwait', 3 December 1999, para 3.

<sup>6</sup> Available at <<http://is.muni.cz/do/law/kat/kupp/hrim/states/kuwait.html>> accessed 13 May 2015.

<sup>7</sup> CCPR/C/KWT/2, 'Second Periodic Report of States Parties: Kuwait', 26 October 2009, para 2; CCPR/C/KWT/3, 'Third Periodic Reports of States Parties Due in 2014: Kuwait', 8 December 2014, para 3(b).

The statements that follow here are drawn from and supported by these sources and full references are provided in Appendix A which details the sources of all principles summarised here.

### **3.2.1 General Conduct**

The key principles of general conduct required of police officers are:

- a)** at all times fulfil the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession
- b)** respect and protect human dignity and maintain and uphold the human rights of all persons
- c)** use force only when strictly necessary and the extent required for the performance of their duty
- d)** keep matters of a confidential nature in the their possession confidential, unless the performance of duty or the needs of justice strictly require otherwise
- e)** do not inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment
- f)** ensure the full protection of the health of persons in their custody and, in particular, shall take immediate action to secure medical attention whenever required
- g)** shall not commit any act of corruption. They shall also rigorously oppose and combat all such acts
- h)** shall respect these principles and, to the best of their capability, prevent and rigorously oppose any violations. This includes reporting any violation or threat of violation to the appropriate authorities.

In addition, police officers must exercise their powers 'fairly, responsibly, with respect for people

suspected of committing offences, and without unlawful discrimination'. These powers should also not be used to discriminate against, harass or victimise any person on the grounds of the "protected characteristics" of age, disability, gender reassignment, race, religion or belief, sex and sexual orientation, marriage and civil partnership, pregnancy and maternity'.

### **3.2.2 Prevention**

The key principles of prevention required by international best practice are:

- a)** the criminal law shall clearly set out offences
- b)** the criminal law shall clearly set out the appropriate penalties, which take into account the seriousness of the offence
- c)** the criminal law shall take into account whether exceptional circumstances such as a state of war or threat of war, internal political instability or any other public emergency may be invoked as a justification for an offence
- d)** the Government shall ensure strict control, including a clear chain of command over all officials responsible for apprehension, arrest, detention, custody and imprisonment, as well as those officials authorised by law to use force and firearms
- e)** clear guidelines shall be established which clearly set out powers of police officers and their superiors
- f)** effective training of law enforcement officials on criminal law shall be provided
- g)** Governments shall make every effort to prevent crime through measures such as public denunciation, improved access of complaints to intergovernmental and judicial bodies, and diplomatic intercession.

### 3.2.3 Investigation

International best practice stresses that investigations should follow “the golden thread of evidence”<sup>8</sup> from the initial investigations through to the conclusion of the trial proceedings. It also suggests that effective and clear laws, regulations and codes of practice should be developed in relation to the following:

1. powers to stop and search
2. powers of entry, search and seizure
3. surveillance
4. scene investigations
5. searches of detained persons
6. suspect's rights
7. tape and audio recordings of interviews
8. fingerprinting
9. impressions of footwear
10. intimate samples
11. other non-intimate samples
12. destruction of evidence
13. photographing of suspects.

The body of international best practice identifies that the key principles that should be adhered to when creating these legal frameworks are as follows:

- a)** there should be reasonable grounds for a police officer's actions
- b)** the police officer must have the power to act
- c)** the police officer's actions must be recorded in writing as soon as practicable
- d)** the police officer's actions should be monitored
- e)** a police officer should be subject to disciplinary action for misconduct
- f)** the police officer should take into account sensitivities such as sex, age, right to privacy and right to property when acting
- g)** the police officer must act with courtesy, consideration and respect for the person concerned
- h)** the required actions should be carried out as soon as practicable and within reasonable time
- i)** evidence not linked to a crime should be destroyed, unless express consent is given by the individual
- j)** a suspect should be warned when inferences can be drawn
- k)** a suspect has a right to let someone know where they are
- l)** a suspect has a right to free legal advice
- m)** a suspect's consent should be given for any actions taken against their person (removal of clothing, search, fingerprinting, footwear impressions, samples etc), though there are certain exceptional circumstances
- n)** surveillance must be necessary and proportionate
- o)** surveillance must be authorised, the authorisation must be from the relevant person and recorded
- p)** surveillance must be follow conduct and purpose set out in the authorisation
- q)** surveillance material must not be disclosed without authorisation
- r)** if relevant, third parties involved in surveillance should be compensated for the costs ensued
- s)** interviews should be recorded
- t)** an interviewee should be made aware of their rights
- u)** all evidence should be adequately and thoroughly investigated, analysed and stored
- v)** investigations should be diligent and expedient.

<sup>8</sup> Woolmington v Director of Public Prosecutions [1935] AC 462, Viscount Sankey.

### 3.2.4. Powers of Arrest

Overall the conclusion drawn from international best practice suggests that effective and clear laws, regulations and codes of practice should be developed in relation to:

- a)** arrest without warrant;
- b)** information to be given at arrest;
- c)** voluntary attendance at police station;
- d)** arrest elsewhere than police station;
- e)** bail; and
- f)** arrest for further offences.

The learning offered from the international best practice standards suggests that the key principles that should be followed in relation to police officers exercising powers of arrest include:

- a)** making a suspect aware of his/her rights as soon as practicable
- b)** ensuring that a suspect understands his/her rights
- c)** ensuring that all the required actions are made as soon as practicable
- d)** considering whether the use of the powers of arrest are justified
- e)** considering whether the use of the powers of arrest are necessary for the objective
- f)** considering whether less intrusive means than the powers of arrest are more appropriate
- g)** ensuring that force is only used where it is absolutely necessary, reasonable and proportionate
- h)** ensuring that any decision is confirmed in writing.

### 3.2.5 Detention

International best practice suggests that effective and clear laws, regulations and codes of practice should be developed in relation to:

1. basic rights
2. right to legal advice
3. detention conditions
4. limitations on police detention
5. designated police stations
6. duties of custody officers before and after charge
7. release on bail
8. custody records
9. responsibilities to person detained
10. review of police detention
11. limits on period of detention
12. authorisation of continued detention
13. use of video conference facilities for decisions about detention
14. live link bail
15. powers of arrest for failure to answer to police bail
16. records of detention

The guidance offered by best practice internationally suggests the following key principles should be addressed in relation to detention:

- a)** the right to consult privately with a solicitor and that free independent legal advice is available
- b)** the right to have someone informed of their arrest
- c)** the right to consult the Codes of Practice
- d)** if applicable, the right to interpretation and translation
- e)** adhering to the time limits of detention
- f)** ensuring that detention is only extended if it is necessary and appropriately authorised
- g)** allowing the detainee or his/her solicitor to make representations about the detention

**h)** ensuring everything about the detention is recorded in writing

**i)** ensuring that the cell are of a reasonable standard of comfort and cleanliness

**j)** ensuring that the clothes are of a reasonable standard of comfort and cleanliness

**k)** ensuring that the detainee has appropriate access to food, water and exercise

### 3.2.6 Scrutiny of Authorities within the system

In the interests of promoting fair procedures international best practice identifies that it is important to introduce and maintain mechanisms for scrutinising the relevant authorities within the criminal justice system. Effective scrutiny requires both internal and external monitoring, complaints and review mechanisms. Internal mechanisms enable monitoring of police officers and for concerns or complaints to be reported to their superiors. For scrutiny to be effective it also requires that the complaints or serious concerns are effectively investigated and remedies are provided where required. External mechanisms are independent bodies who deal with serious cases of police misconduct and appeals against decisions from internal decisions. The UK provides an example of best practice in this regard. It has established an Independent Police Complaints Commission (IPCC) and Surveillance Commissioner. The role of these Commissions is not only to investigate matters, but also to issue guidance.

The international best practice here suggests these following principles:

**a)** provision of internal and external monitoring, complaints and review mechanisms

**b)** effective investigation systems and the provision of remedies

### 3.2.7 Legal Proceedings

This is an area whose outlines are covered comprehensively in existing law Kuwait. The right to a fair trial is protected by Article 34 of the Constitution of Kuwait, Article 14 of the ICCPR and Article 13 of the Arab Charter. It 'serves as a procedural means to safeguard the rule of law' and aims to ensure 'the proper administration of justice'.<sup>9</sup> The right to a fair trial extends to civilian, military and religious tribunals.<sup>10</sup> Many of the elements contained within this right are reflected in Kuwait's criminal justice system through its penal codes. These codes broadly protect a defendant's right to a lawyer,<sup>11</sup> right to silence,<sup>12</sup> right of access to court,<sup>13</sup> right to appeal<sup>14</sup> and a right to know the identify of the judge.<sup>15</sup>

It should be noted that particular threats to the right to a fair trial, and therefore examples of bad practice, include:

**a)** exclusion of the public, the accused or their representative from the proceedings;

**b)** restrictions of the right to a lawyer of the accused's own choice;

**c)** severe restrictions or denial of the accused's right to communicate with their lawyers, particularly when held incommunicado;

**d)** threats to lawyers;

**e)** inadequate time for preparation of the case;

**f)** severe restrictions or denial of the right to summon and examine or have examined witnesses; and

**g)** the use of anonymous judges.

The best practice guidelines suggest that the following areas be addressed and secured in order

9 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 2.

10 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, paras 22 and 24.

11 Article 74 and 98, Law No 17, Penal Proceedings and Trial Code 1960.

12 Article 98, Law No 17, Penal Proceedings and Trial Code 1960.

13 Article 141, Law No 17, Penal Proceedings and Trial Code 1960.

14 Articles 199-213, Law No 17, Penal Proceedings and Trial Code 1960.

15 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 23.



to underwrite the provision of a fair trial:

- a)** equality of arms
- b)** right to an adversarial trial
- c)** access to justice
- d)** right to legal assistance
- e)** right to independent and impartial tribunal
- f)** right to a fair hearing
- g)** right to a public hearing
- h)** honouring the presumption of innocence
- i)** right to notification of the charge
- j)** right to adequate time and facilities for defence
- k)** ensuring detention during trial is no longer than necessary in the circumstances
- l)** defence rights
- m)** right to examine witnesses
- n)** right to an interpreter
- o)** right to privilege against self-incrimination
- p)** exclude evidence obtained through torture or ill-treatment
- q)** additional protections for juvenile persons
- r)** right to appeal
- s)** right to a reasoned judgment
- t)** right to compensation for miscarriage of justice
- u)** no one shall be liable to be tried or punished again for an offence of which they have already been fully convicted or acquitted in accordance with the law and penal procedure.

### 3.3 Conclusion

The principles outlined here provide a guide to international practice and an indication of the context in which they may be used. While some of these appear directly in legal form within the Kuwaiti system in the Constitution and other statutes it is worth giving consideration to whether they might be consolidated within a specially codified instrument. One model that might be appropriate in this context can be found with the UK's Police and Criminal Evidence Act 1984. Here the key principles are set out in legislation and are supported by codes of practice. These codes of practice are periodically open to consultation from the public and, on the basis of the responses, updated accordingly. The legislation and codes of practice are made publically available and regular training is provided to all of those involved across the criminal justice system.

#### Recommendation No. 1

While many of the principles of best practice are given expression directly within the constitution and law of Kuwait consideration should be given to developing and consolidating these standards within a specially codified instrument which sets out the key principles in legislation and is supported by codes of practice.





## 4. From Crime Scene to Courtroom: the Criminal Justice System in Action

This part of the report reflects on the observations of the criminal justice system in action undertaken and the interview and other material obtained from participants in the criminal justice system.

### 4.1 Contextual Setting and the Designation of Crime Categories

The investigation of crime, the prosecution of offenders and the provision of crime scene and forensic related support services in Kuwait are directed and managed by two separate Ministries: the Ministry of the Interior (Mol), and the Department of Public Prosecutions within the Ministry of Justice (DPP/MoJ). Responsibilities are allocated according to the type of crime, the investigation procedure and the severity of punishment. There are two main categories:

#### i. Misdemeanour Crimes: Ministry of the Interior

These crimes where conviction carries penalties of up to 3 Years imprisonment or a fine of up to KD 3,000. Investigators are:

- a. appointed and trained by the Mol;
- b. based at local Police Stations, respond to persons reporting crimes at the local police station, and are called-out to crime scenes by local police;
- c. able to undertake investigations and direct and manage the actions of the local police and forensic practitioners in supporting investigations; and,
- d. empowered to escalate/transfer the case to be investigated by DPP investigators if they deem that the evidence warrants it.
- e. report offences for prosecution.
- f. prosecute in court

#### ii. Serious Crimes: Department of Public Prosecutions / Ministry of Justice

These are crimes carrying penalties in excess of those for misdemeanour crimes or because the nature, context or impact of the crime is of sufficient gravity that its investigation requires specialist knowledge or skills. Investigators are:

- a. appointed and trained by the DPP/MoJ
- b. based at regional offices and, when deemed necessary by attending police, are called to an incident
- c. able to undertake investigations and direct and manage the actions of the local police and forensic practitioners in supporting investigation
- d. report offences for prosecution
- e. prosecute in court

It was reported by a broad spectrum of those interviewed that the above separation of responsibility had a number of demonstrable disadvantages and is negatively impacting upon the efficiency and effectiveness of investigations and prosecutions.

A number of international jurisdiction, including the United Kingdom adopt a different designation which may be considered useful.

Figure 1: Suggested Alternative Criminal Categories

**Volume Crimes/Incidents:**

defined as:  
*‘...any crime (or incident) which, through its sheer volume, has a significant impact on the community and the ability of the local police to tackle it. Volume crime often includes priority crimes such as street robbery, burglary and vehicle-related criminality, but can also apply to criminal damage or assaults.’<sup>1</sup>*

This designation is important as it helps to determine the appropriateness and scale of the investigatory response. It also allows for the later incorporation

1 ACPO (2009) Practice Advice on the Management of Priority and Volume Crime (The Volume Crime Management Model) (Second Edition)

of crime evidence from numerous individual volume crime scenes into one collective major crime if an investigation uncovers a common connection. (For example a theft of a vehicle which is later used in a criminal offence and then abandoned.)

**Major or Complicated Incidents:**

defined as:  
*‘Major crime can be defined as any crime requiring the appointment of a Senior Investigating Officer and the deployment of specialist resources. This will include not only homicide, attempted homicide and manslaughter but also may potentially encompass sexual assaults and other serious offences. In assessing the threat presented by major crime ...’<sup>2</sup>*

2 Thematic Inspection of Major Crimes. (2009), Her Majesty’s Inspectorate of Constabulary. London. HMIC. (P 6).

The application of this approach allows for the scaleable deployment of a standard response for a single team of forensic practitioners to a volume crime, or two or more teams to a major or complicated crime with no loss of integrity or diminution of quality in to the evidence harvesting process.

Such an approach also ensures that each crime scene - volume or major - is processed to the same high standard using a collaborative approach based on clearly delineated and agreed Standard Operating Protocol. In the case of volume crimes the lead crime Investigator will liaise with the senior crime scene specialist on site in relation to the identification and prioritisation of evidence to be harvested. In the case of serious crimes there is the likelihood that more than one team of

forensic practitioners will be required. This may be necessitated by the number of interconnected crime scenes; the sheer scale of the main crime scene; or the overarching necessity to prevent cross contamination of individual scenes by scenes of crime officers moving between scenes. When investigating serious crimes, a number of specific management roles are established to direct operations and to quality assure the evidence identification and harvesting processes. In this case a Major Crime Forensic Adviser will liaise with the Senior Investigating Officer in relation to the identification and prioritisation of evidence to be harvested. The Incident Management process suggested is captured in figure 2.

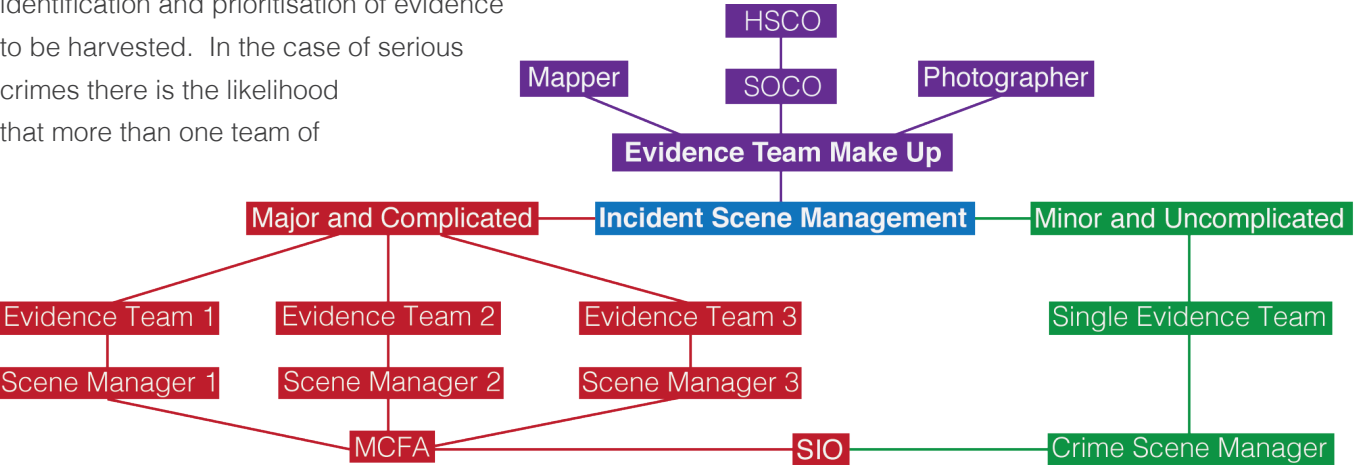


Figure 2. Incident Management

A common view among those interviewed was that the current division of investigatory responsibilities across two separate Ministries was impeding investigatory progress. This was particularly the case when evidence was appearing that a misdemeanour crime was being escalated to a serious crime. The researchers were informed that in practice this was not a simple process. It often required considerable cross-departmental administration and extensive reporting. This could extend beyond several weeks and could delay the start of a new investigation. This extended timeline could have the effect that the crime scene was no longer available for further examination.

## **Recommendation No. 2**

In keeping with the majority of international practice, develop a corporate approach to criminal investigation by amalgamating all investigatory, police, forensic practitioner and scientific activities under one Ministry.

## **Recommendation No. 3**

Develop and implement common and agreed Standard Operating Procedural protocols to guide all crime investigation and forensic practitioner activities from the initial crime scene to the court prosecution.

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## **4.2 Forensic Evidence Gathering**

Although the origins of forensic science can be traced back to legal medicine in 6th century it was not until the 18th and 19th centuries that its role in informing the criminal investigation process became established. It is now readily acknowledged by the international law enforcement community that the provision of professional and reliable forensic services has become a key anchor point in assuring the effectiveness and fairness of the justice system. It is important to understand too that the role of forensic specialists and those who support their activities does not solely focus on crime but also includes incidents such as road traffic collisions, industrial accidents and any other incident where the expertise or support of specialist investigators will inform those who make decisions relating to truth or cause. The ever developing nature of crime and the growth of scientific specialisms required to meet new investigatory demands the role of forensic specialisms has widened to include 'non laboratory' specialists such as mechanical, structural and construction engineers, health specialists and others.

As part of developing best practice the United Nations Office on Drugs and Crime made the

following statement in relation to forensic science:

*The ultimate objective of forensic science is to contribute to finding the truth, more precisely to provide the criminal justice system with answers, using objective evidence, and by questions aimed at determining the guilt or innocence of an offender. It is therefore essential that forensic services are provided by a highly qualified and impartial entity.'*<sup>3</sup>

This statement underlines the importance attached in this report to the role of forensics and all the supporting agencies who work to secure high standards in evidence gathering.

### **4.2.1 Collaborative Partnerships and a Team Approach**

Current international best practice recognises that in order to service the needs of each specific and unique crime, a professional investigatory response requires the adoption of a quality assured *collaborative, team* approach. This will involve a collection of approved 'forensic practitioners'

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<sup>3</sup> Policing, Forensic Services and Infrastructure. Criminal Justice Assessment Toolkit 5. (2010), New York: United Nations. (P 1).

drawn from interrelated and mutually supportive disciplines. They will work together with all others in the criminal justice system to This team is only formed for the duration of the investigation; each specialist discipline supporting the other with the competencies necessary for that investigation. Forensic practitioner teams work to standardised and agreed procedures, processes and protocols that ensure the highest levels of service quality, evidence validity and individual accountability. Procedures are collectively designed to ensure the integrity, identity and '*trackability*' of all evidence throughout the forensic process.<sup>4</sup>

Current best practice indicates that all team members be trained and have their competency assessed in their specific discipline. In addition, they should participate in planned and on-going professional knowledge and competency development which is tested at regular 12 to 24 month intervals to ensure their continued competence in role.

#### 4.2.2 Core Response Team Make-up

A typical core response to a crime scene would comprise:-

##### Uniform police to:

Secure the scene; To protect evidence; and to commence an incident log in preparation for the arrival of investigators (police or otherwise)

##### Investigators to:

Manage and undertake direct investigations; liaise with other crime scene practitioners; and ensure that maximum evidential value is harvested from the scene

##### Police Crime Scene Practitioners to:

Identify and harvest such evidence that they identify or as directed by the lead investigator

##### Additional Specialists

If, due to the nature or seriousness of the incident, representatives of the Department of Forensic Science or a Specialist Medical Examiner is required they may be called to provide specialist support or guidance. Other specialisms such as structural or civil engineers can also be called if necessary;

however, as these specialists are not usually familiar with crime or incident scene protocols they will require close supervision, guidance and management.

It is of vital importance that each element of the response team undertakes their tasks in a mutually supportive manner recognising that their collective knowledge, experience and abilities is often more important than individual rank structures.

#### Recommendation No. 4

Develop a team approach to evidence management through a compulsory general training programme and competency assessment regime that recognises the role of each individual within the criminal justice system and ensures that everyone is fully aware of and trained for their role in securing the evidence chain.

#### 4.2.3 The Chain of Evidence Integrity

For many years the evidential journey from the crime scene to the courtroom has been described as a 'chain of custody'. A more accurate term is to describe it as a 'chain of evidence integrity'. If this integrity can be challenged in anyway, the validity and worth of the evidence to the court process may be called into doubt. This chain of integrity requirement must be applied to all stages of the evidence chain process; from discovery and collection of evidence at the initial crime scene, the recording of its location relative to the boundaries of the crime scene, its packaging and labelling in the form of exhibits, the transportation, custody trail, means of storage of the evidence in a suitable environment, its examination and presentation of the evidence throughout all court phases.

The ultimate analysis of the evidence will be undertaken by trained scientists in strictly quality controlled laboratory conditions. However, the nature and complexity of crime scenes, particularly those involving violence are uncontrolled. At these scenes, forensic practitioners must protect, identify, gather, containerise for transportation and record items of evidence in non-clinical, often unpleasant

<sup>4</sup> Policing, Forensic Services and Infrastructure. Criminal Justice Assessment Toolkit 5. (2010), New York: United Nations. (P 3).

time critical situations where there may be a high risk to their personal security or health and they must do so without contaminating or diminishing the evidential value. This requires considerable expertise and diligence. The evidence will then be passed along a custody chain made up of non-scientists whose responsibility it is to store or transport the evidence while maintaining its integrity, account for and record all steps in the process. The evidence will then be handed over into the controlled surroundings of a scientific laboratory where it is examined and analysed by scientists and other subject matter experts who draw professional conclusions from the evidence. When these experts have concluded their forensic examination the evidence will be returned to the custody of those responsible for the investigatory process where its integrity will be maintained until after the trial when its ultimate disposal will be decided.

This underlines the importance of all those involved in the chain of evidence integrity from the first responder to an incident right up to the expert in the forensic science laboratory and then into the courtroom.

#### **4.3.1 Managing the Crime Scene**

One of the fundamental rules of forensic evidence states that 'every contact leaves a trace'. Therefore, the very presence of any person - victims, witnesses, bystanders or the initial police responders - entering a crime scene has the potential to destroy evidence and undermine the integrity of the evidence gathering process. All those at the crime scene have the potential to leave evidential traces, remove, tamper or contaminate vital forensic evidence. International best practice recognises that the time lapse between the commission of an incident and the initial police responders securing the scene is of critical importance in the investigation process.

It is also important to take into account the fact that in the case of injury or death a person and their clothing become an extension of the crime scene and as a result require specialist handling. Injured or dead persons must also be accompanied to

hospital or mortuary where procedures will be used to secure forensic evidence and take possession of clothing and effects. This is of particular importance in the case of a mortuary which is also used for non-forensic procedures.

#### **Recommendation No. 5**

A suitable specialist training programme should be developed for all those involved in the crime scene processes to ensure they are trained to an appropriate level in managing a crime scene and assessed as competent in their role. Training should be practical and scenario based and be effectively assessed. Only those who have met the success requirements should be used in the specified roles.

#### **4.3.2 Following the detailed steps from crime scene to courtroom**

There are a number of roles involved in any crime scene. As an incident is responded to, a site secured and an investigation begins there are a wide range of personnel involved. Each step in the procedure from crime scene to courtroom must be reviewed for its impact on the wider criminal justice process.

#### **4.3.3 The Role of Police Responders**

Management of the time between the arrival of the first responder and that of the specialist forensic practitioners is vital in terms of ensuring evidence validity. Depending upon the location of the incident in relation to a local police station may mean that it will take perhaps 5 to 10 minutes from the initial notification for police to arrive at the scene. The decision to call specialist forensic practitioners to the scene is made by the initial responders and only after they have conducted an assessment of the incident scene. It is therefore not unreasonable to believe that there will be a considerable time lag before specialist practitioners and DPP Investigators arrive on site to give advice and guidance and to commence the investigatory process. The longer this time lag the more the requirement for an effective and efficient response from the initial police responders.

As stated earlier, there is a fundamental recognition among the legal and criminal investigation community that the '*chain of evidence integrity*' and hence the '*forensic process*' begins at the crime scene with the arrival of the first police responder<sup>5</sup>. It is best practice that a double cordon is imposed at all crime scenes: The outer cordon being used and to prevent unauthorised entry to the scene by unauthorised persons and to maintain a sterile area within which the police investigation can continue unhindered. The outer cordon should have one entry point manned by uniformed police officers one of whom is also responsible for recording the details of all of those who enter the sterile area in the crime scene log. The inner cordon is much more defined and is designed to limit entry to the crime scene. Only those authorised by the scenes of crime specialists are permitted to enter. An entry log must be maintained by the investigator.

During the research interviews it was reported that:

- i. In a high number of cases there was an unwarranted delay in establishing an effective outer cordon by the first police to attend the incident.
- ii. That on occasions that police would wait for the arrival of an investigator before imposing a cordon
- iii. That where cordons were established, the public continued to enter crime scenes thus potentially compromising the integrity of any evidence present.
- iv. It was reported by four of those interviewed that police officers had been observed at crime scenes taking unauthorised photographs of themselves in the crime scene and posting them on social media sites.

#### **Recommendation: No. 6**

The police hierarchy must take steps to ensure that the first police responder of whatever rank or service responding to an incident has the knowledge, capability and authority to put in place agreed duties and procedures, and has the skills, knowledge and authority to maintain integrity of the evidence.

#### **4.3.4 The Development of a Crime Scene Log**

It is vitally important that the initial responder commences an incident or scene log directly upon their arrival at the scene. The the priority is to protect life, secure the scene locus and commence an incident log. This log will support the investigation by accounting for the presence of *all* persons who enter, undertake specialist investigatory activities or leave the scene. If for example a person has sustained an injury and has to be conveyed to hospital, details of the injured person, the ambulance personnel and the destination hospital are recorded prior to their leaving. The log is maintained as an unbroken timeline from the arrival of the initial first responder to the closure of the scene by the senior investigating officer.

#### **Recommendation No. 7**

An agreed crime scene logging process and protocol to be used at all crime scenes must be developed and suitable training put in place to ensure that is developed in every case.

#### **4.3.5 Incident Scene Management**

Proactive and effective management of all elements in the chain of evidence integrity is greatly enhanced by the development, implementation and management of agreed end-to-end standard operational procedures which are applied to all stages of the crime scene to court processes. In addition this approach makes the decision to prosecute much clearer and as a result reduces the number of criminal cases that are withdrawn due to failures in evidential validity.

In order to assure the validity of evidence throughout the process it is important that all operatives and their directing organisations; police, DPP/MoJ and MoI investigators, scenes of crime officers, forensic scientists

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<sup>5</sup> Thematic Inspection of Major Crimes. (2009), Her Majesty's Inspectorate of Constabulary. London. HMIC. (P 6).



and other specialists, work to the agreed standard operating procedures and undertake their tasks in a mutually supportive manner.

To aid in this process, the development, introduction and compliance with the following documents would be considered a baseline requirement:

- a. A Quality Performance Manual for all stages in the forensic evidence processes and investigatory practice;
- b. A Standard Operating Procedure Manual that provides guidance and assists in maintaining high levels of compliance across all investigators and crime scene practitioners;
- c. Common multi-discipline training processes and protocols across all organisations and roles.
- d. A means of providing and recording continual competency assessments that are pass/fail; and,
- e. Agreed standard crime scene and evidence logs.

#### **4.3.6 Managing the Evidence Harvesting and Storage Process**

Key elements of the evidence harvesting process include the preservation of the scene, the search for material of evidential value, the recording of its precise location in cartographic, photographic and written form, packaging and labelling it appropriately in order to prove its presence at the crime scene and to preserve its evidential integrity. Details of all evidence harvested are entered in a formal evidence log accompanied by the details of the person finding and processing it.

Best practice would dictate that in order to ensure the integrity of evidence within the crime scene, initial entry to the scene is limited to the scenes of crime specialist/s. It is only after the scenes of crime specialists has secured a safe path into the scene and undertaken an initial evidential search of the area that investigators and other forensic practitioners are permitted to enter. The investigator is responsible for the investigation however, the crime scene specialist is responsible for the integrity of the crime scene; experience proves that at times this delineation can cause unnecessary conflict. However, the rule is simple, and the rank, seniority or wishes of the investigator must become secondary to the preservation

of evidence integrity. The understanding of this primacy can best be understood during scenario based experiential cross-discipline training.

#### **4.3.7 Managing the Evidence Accountability and Continuity**

Evidence accountability depends upon a number of key elements:

- a. The competency and compliance of those who harvest, package, record, transport, hand over, store, examine, or in any other way impact on the progress of the evidence through from the crime scene to court.
- b. The accounting infrastructure and protocols such as any bespoke IT based database linked to a tracking barcoded process. This can of course be undertaken in other formats but recent work would indicate that the barcode system present fewer difficulties of integration across the spectrum of investigatory practitioner organisations.
- c. The use of forensically compliant evidence packaging containers that facilitate ease of accounting and track-ability.
- d. The development of suitable and safe evidence storage facilities that will ensure the validity and quality of the evidence and its retrieval for examination or court purposes.
- e. The development of the post of Evidence Manager who will ensure compliance of packaging, storage, transport, and in the final case the disposal or return of the evidence in an accountable and appropriate manner.
- f. The integration and management of the entire process by mutually supportive practices.

#### **Recommendation No. 8**

In order to develop effective management of evidence thorough the whole investigatory process Quality Performance and Standard Operating manuals should be produced detailing all relevant protocols required to guard the integrity of the evidence gathering, storage and transport. Appropriate training should be introduced to ensure these protocols become mainstreamed through the whole process.



#### 4.4 Foundational Forensic Requirements

At the core of professional forensic science provision is the question of the validity, appropriateness and consistency of the 'quality standards' within the scientific process. It is important that forensic laboratories work to and can demonstrate their process compliance with internationally agreed levels of quality assurance. These would include the quality of their premises, performance, policies, procedures, processes and protocols. Perhaps the most internationally accepted standards are those published by the International Organisation for Standardisation (ISO). Specifically:

- i. ISO 17025 – For laboratory tasks together with some core management requirements.
- ii. ISO 17020 – For crime scene work and applies not only to forensic scientists but to all forensic practitioners involved in the evidence process.

Core quality issues include:

- a. The prevention of contamination;
- b. The security of all items of evidence;
- c. An itemised audit trail of the names and contact of all persons who had contact with items of evidence; and,
- d. A permanent record of all scientific procedures carried out on items of evidence, who undertook the procedure and to assure quality, who validated the findings.

As part of the discovery process the research team requested that process support materials be made available to aid the research process: none were made available.

It is understood that for a number of reasons the Forensic Service in Kuwait have not as yet undertaken the necessary steps to gain ISO 17025 or 17020 accreditation. In addition, most sub departments within the laboratory work on a non-integrated IT system, with no external backing up capability. This stand-alone model would preclude the introduction of an integrated administration infrastructure such as one of the specialist IT based

barcoding programmes used internationally. At the same time it is understood that in order to enhance capability the Department is currently progressing the design and building of a new forensic facility. Forensic Scientists

It is accepted within the international community that each scientist is individually responsible for the processes used and outcomes of their investigations; there is no recourse to a claim of corporate responsibility. It is therefore important that forensic scientists can demonstrate current competence in their specialist subject area; this is normally in the form membership of one of a range of recognised peer review bodies and an internal and on-going personal developmental process. The impartiality and integrity of the scientist is also of vital importance. This would also apply to forensic pathologists and those who support them.

#### Recommendation No. 9

Ensure that any new forensic facility design is proactively focused on compliance with the associated ISO standards and has sufficient IT infrastructure to accommodate an evidence administration system, and that the competency of forensic scientists is at an acceptable level and continued with mandatory personal development.

#### 4.5 The Courtroom: Prosecutors, Defence lawyers and judges

While interview evidence did not provide a comprehensive account of evidential and forensic awareness among the legal professions it does seem clear that appreciation of the importance of the integrity of the evidential chain is unevenly reflected across legal personnel. It was reported by some that judges on some occasions exercised a very broad discretion to admit evidence that may have been gathered in ways that would render it inadmissible in other jurisdictions. At the same time the very fact of trials failing because of faults with the evidence chain which occasioned this research suggests that there is an understanding of the importance of sound process and procedure among some lawyers.

The forensic competence within the investigatory process must be mirrored by an appropriate understanding of evidence and forensic standards among the personnel involved in the prosecution, defence and judging of criminal cases.

**Recommendation No. 10**

Appropriate awareness training should be provided to prosecutors, defence lawyers and judges to ensure a degree of 'forensic literacy' which will enable good practice to be recognised and poor attainment in evidence management to be identified and challenged.



### Introduction

The concept of human rights and its extension to the Kuwait's criminal justice system is nothing new. The right to equality,<sup>2</sup> right to liberty,<sup>3</sup> freedom from torture<sup>4</sup> and right to a fair trial<sup>5</sup> are expressly set out with the Constitution of Kuwait 1962 (the Constitution). Through its ratification of the International Covenant on Civil and Political Rights 1966 (ICCPR) and the Arab Charter on Human Rights 2004 (Arab Charter), Kuwait is also bound by these constitutional rights and the obligation to protect procedural fairness. Direct effect has been given to the ICCPR since 26 August 1996<sup>6</sup> and to the Arab Charter since 9 May 2013<sup>7</sup> as confirmed by Article 70 of the Constitution:

- 1) The Amir concludes treaties by decree and transmits them immediately to the National Assembly with the appropriate statement. A treaty has the force of law after it is signed, ratified, and published in the Official Gazette.

Furthermore, Kuwait's Government has stressed that 'Kuwait's accession to the [ICCPR] is a concrete indication of the depth of its concern with human rights issues'.<sup>8</sup> A variety of procedural rights at the trial stage are also protected within Kuwait's Law No 16 Penal Code 1960 and its Law No 17 Penal Proceedings and Trials Code 1960.

The purpose of this research is to confirm Kuwait's domestic and international obligations concerning its criminal justice system. It considers each stage of the criminal justice process – 1) the general conduct required of police officers; 2) establishment of criminal laws; 3) initial investigations; 4) powers of arrest; 5) detention; 6) scrutiny of the authorities; and 7) trial proceedings. It identifies the key principles related to each stage and provides examples of best practice on how to ensure effective adherence to these principles. These key principles are drawn from: the European Convention on Human Rights 1950; the

ICCPR; the United Nations' (UN) Code of Conduct for Law Enforcement Officials 1979 (Code of Conduct 1979); the United Kingdom (UK)'s Police and Criminal Evidence Act 1984 (PACE) and its Codes of Practice; the UN's Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions 1989 (1989 Principles); the UN's Model Protocol for a Legal Investigation of Extra Legal, Arbitrary and Summary Executions 1991 (Minnesota Protocol); and the UK's Regulation of Investigatory Powers Act 2000 (RIPA).

### 1. General Conduct

The UN Code of Conduct for Law Enforcement Officials provides a good overview of international best practice in this regard. It requires that police officers:

- a) at all times fulfil the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession;<sup>9</sup>
- b) respect and protect human dignity and maintain and uphold the human rights of all persons;<sup>10</sup>
- c) use force only when strictly necessary and the extent required for the performance of their duty;<sup>11</sup>
- d) keep matters of a confidential nature in their possession confidential, unless the performance of duty or the needs of justice strictly require otherwise;<sup>12</sup>
- e) do not inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment;<sup>13</sup>
- f) ensure the full protection of the health of persons in their custody and, in particular, shall take immediate action to secure medical attention whenever required;<sup>14</sup>
- g) shall not commit any act of corruption. They shall also

<sup>1</sup> The authors are particularly grateful to Dr Hannah Russell for her valuable research assistance with this element of the project.

<sup>2</sup> Article 29, Constitution of Kuwait 1962.

<sup>3</sup> Article 29, Constitution of Kuwait 1962.

<sup>4</sup> Article 31, Constitution of Kuwait 1962.

<sup>5</sup> Article 34, Constitution of Kuwait 1962.

<sup>6</sup> CCPR/C/120/Add.1, 'Initial Report of State Parties Due in 1997: Kuwait', 3 December 1999, para 3.

<sup>7</sup> Available at <<http://is.muni.cz/do/law/kat/kupp/hrim/states/kuwait.html>> accessed 13 May 2015.

<sup>8</sup> CCPR/C/KWT/2, 'Second Periodic Report of States Parties: Kuwait', 26 October 2009, para 2; CCPR/C/KWT/3, 'Third Periodic Reports of States Parties Due in 2014: Kuwait', 8 December 2014, para 3(b).

<sup>9</sup> Article 1, Code of Conduct for Law Enforcement Officials, 17 December 1979.

<sup>10</sup> Article 2, Code of Conduct for Law Enforcement Officials, 17 December 1979.

<sup>11</sup> Article 3, Code of Conduct for Law Enforcement Officials, 17 December 1979.

<sup>12</sup> Article 4, Code of Conduct for Law Enforcement Officials, 17 December 1979.

<sup>13</sup> Article 5, Code of Conduct for Law Enforcement Officials, 17 December 1979.

<sup>14</sup> Article 6, Code of Conduct for Law Enforcement Officials, 17 December 1979.

rigorously oppose and combat all such acts;<sup>15</sup>

h) shall respect these principles and, to the best of their capability, prevent and rigorously oppose any violations. This includes reporting any violation or threat of violation to the appropriate authorities.<sup>16</sup>

The following sub-sections consider two of these principles, the protection of life and prohibition of torture, in more detail.

### Protection of Life

Drawing from Article 2 of the ECHR and the jurisprudence of the European Court of Human Rights (ECtHR) a suggested best practice has been developed concerning use of force. These principles are supported by the ICCPR.<sup>17</sup> The right to life requires that no one shall be arbitrarily killed.<sup>18</sup> This sets the obligations to regulate the use of force, to establish clear legal frameworks for protecting life and to effectively investigate when a suspicious death occurs. These obligations apply at all stages of the investigation and during detention.

### Protection by Law

Article 2(1) of the ECHR states that ‘everyone’s life shall be protected by law’. This requires developing adequate and effective legal and administrative frameworks that are specific, clear and detailed.<sup>19</sup> This requires implementing prevention, suppression and punishment measures which deter offences linked to the right to life such as:

- a) effective criminal provisions that prohibit homicide and excessive use of force;
- b) implementing clear and effective regulations and guidelines for the use of force; and
- c) ensuring that State agents are supervised and effectively controlled.<sup>20</sup>

Adequate and effective steps must also be taken to prevent avoidable deaths.<sup>21</sup> This requires *inter alia*:

- a) effectively planning operations;
- b) ensuring the appropriate lines of communication are used; and
- c) ensuring agents using force are effectively trained.<sup>22</sup>

<sup>15</sup> Article 7, Code of Conduct for Law Enforcement Officials, 17 December 1979.

<sup>16</sup> Article 8, Code of Conduct for Law Enforcement Officials, 17 December 1979.

<sup>17</sup> HRI/GEN/1/Rev.9 (Vol I), ‘General Comment No 6: Article 6 (The Right to Life)’, 30 April 1982.

<sup>18</sup> Article 2, European Convention on Human Rights 1950; Article 6, International Covenant on Civil and Political Rights 1966; Article 5, Arab Charter on Human Rights 2004.

<sup>19</sup> *McCann v United Kingdom* (1995) 21 EHRR 97.

<sup>20</sup> Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (OUP, 2011), 162.

<sup>21</sup> *Osman v United Kingdom* (2000) 29 EHRR 245.

<sup>22</sup> *McCann v United Kingdom* (1995) 21 EHRR 97.

### Use of Force

Article 2(2) of the ECHR identifies three scenarios where force may be used. These are:

- a) in defence of any person from unlawful violence;
- b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; and/or
- c) in action lawfully taken for the purpose of quelling a riot or insurrection.

A riot is defined as resistance through acts of violence which cause widespread disruption to the status quo.<sup>23</sup> An insurrection is a violent uprising against an authority or Government.<sup>24</sup> These requirements extend to the use of lethal and less-lethal methods of force.<sup>25</sup>

The force used must be no more than absolutely necessary, reasonable, and proportionate. This requires that:

- a) the force used is strictly proportionate to the achievement of permitted aims;
- b) the individual that force is used against must pose a threat to life or limb;
- c) the individual that force is used against must be suspected of having committed or threaten to commit a violent offence;
- c) the force used must be a last resort, there must be no other way to safeguard innocent lives; and
- d) those using force must give a prior warning that force will be used.<sup>26</sup>

The use of force takes into account all of the surrounding circumstances. This requires considering *inter alia*:

- a) the general context of the operation;
- b) the orders given;
- c) the information supplied to agents in the field;
- d) the links between the agents in the field and the hierarchy;
- e) the conduct of operations;
- f) the type and extent of force was appropriate in the circumstances;
- g) the intention or aim behind the use of force; and

<sup>23</sup> *Gülec v Turkey*, Application No 21593/93, Judgment of 27 July 1998; *Simsek and Others v Turkey* (2005) ECHR 546; *Stewart v United Kingdom* (1984) 7 EHRR 453; *Perisan v Turkey*, Application No 12336/03, Judgment of 20 May 2010; *Gömi v Turkey*, Application No 35962/97, Judgment of 21 December 2006. See also Hannah Russell, ‘The Right to Life under Article 2 of the ECHR in light of European Conflicts’ (Queen’s University Belfast, 2015), 84-86.

<sup>24</sup> Hannah Russell, ‘The Right to Life under Article 2 of the ECHR in light of European Conflicts’ (Queen’s University Belfast, 2015), 84-86.

<sup>25</sup> *Simsek and Others v Turkey* (2005) ECHR 546.

<sup>26</sup> *McCann v United Kingdom* (1995) 21 EHRR 97.

h) the operational plans and whether there was time to consider other means.<sup>27</sup>

Preparation and control of operations must be conducted in a way which minimises, to the greatest extent possible, recourse to lethal force.<sup>28</sup> Ample opportunity must be given to plan the reaction.<sup>29</sup> The typical steps are:

- a) issuing a warning;
- b) the use of less-lethal force (eg rubber bullets, plastic bullets, CS gas and water cannons); and
- c) the use of live ammunition,<sup>30</sup>

the progression of which is determined by the surrounding circumstances.<sup>31</sup>

It must be proved beyond reasonable doubt that the use of force is absolutely necessary, reasonable and proportionate.<sup>32</sup> Inferences can be drawn in situations where the State refuses to provide a sufficient explanation or the explanation provided fails to fit within Article 2(2).<sup>33</sup>

### Investigate Suspicious Deaths

It is suggested best practice for the authorities to effectively investigate any suspicious deaths.<sup>34</sup> The purpose of the investigation is to identify and bring to justice those responsible for the death, and to discover the truth about events leading to the suspicious death of a victim.<sup>35</sup> This involves the investigation being:

- a) of the State's own motion;<sup>36</sup>
- b) prompt;<sup>37</sup>
- c) conducting with reasonable expedience;<sup>38</sup>
- d) thorough;<sup>39</sup>

e) independent and impartial;<sup>40</sup>

f) subject to public scrutiny.<sup>41</sup>

### Freedom from Torture and Ill-treatment

Under no circumstances or at any point in the investigation shall a person be subject to torture or ill-treatment by a police officer.<sup>42</sup> This includes threats of torture or ill-treatment.<sup>43</sup> No police officer:

shall invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.<sup>44</sup>

These obligations are applicable at all stages of the investigation and during detention.

27 *McCann v United Kingdom* (1995) 21 EHRR 97; Jean-François Akandji-Kombe, *Positive Obligations Under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights* (Council of Europe, 2007), 24.

28 *McCann v United Kingdom* (1995) 21 EHRR 97; *Ergi v Turkey* (1998) ECHR 59; *Isayeva, Yusupova and Bazayeva v Russia* (2005) ECHR 129.

29 *McCann v United Kingdom* (1995) 21 EHRR 97.

30 *Simsek and Others v Turkey* (2005) ECHR 546.

31 *Simsek and Others v Turkey* (2005) ECHR 546.

32 *Aktas v Turkey* (2003) ECHR 194; *Saidova v Russia* (2013) ECHR 772.

33 *Kaya v Turkey* (1998) ECHR 10.

34 *Ergi v Turkey* (1998) ECHR 59.

35 *Kaya v Turkey* (1998) ECHR 10; E/ST/CSDHA/12 'United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions' (1999), III.B.

36 *McCann v United Kingdom* (1995) 21 EHRR 97.

37 *Mentese and Others v Turkey* (2005) ECHR 22; *Aslakhanova and Others v Russia* (2012) ECHR 2075.

38 *Mahmut Kaya v Turkey* (2000) ECHR 129.

39 *Hugh Jordan v United Kingdom* (2001) ECHR 327; *Kolevi v Bulgaria* (2009) ECHR 1838.

40 *Hugh Jordan v United Kingdom* (2001) ECHR 327; *Kamalak v Turkey*, Application No 2251/11, Judgment of 8 October 2013.

41 *McCann v United Kingdom* (1995) 21 EHRR 97.

42 Article 31(2), Constitution of Kuwait 1962; Article 7, International Covenant on Civil and Political Rights 1966; Article 8, Arab Charter on Human Rights 2004.

43 *Gäfgen v Germany* (2010) ECHR 759.

44 Article 5, Code of Conduct for Law Enforcement Officials, 17 December 1979.



## 2. Prevention

Clarkson identifies that 'all law, including criminal law, is designed as a mechanism for achieving social control. Its purpose is the regulation of conduct and activities within society'.<sup>45</sup> Its function is four-fold:

- 1) to identify what constitutes a crime;
- 2) to define the 'circumstances in which criminal liability is warranted' and to 'name and grade the relative seriousness of the various offences';
- 3) to reduce crime and aid enforcement of the law;
- 4) to determine the appropriate punishment when a crime is committed.<sup>46</sup>

Therefore, the favourable outcome is that the establishment of an effective system of criminal laws and enforcement will act as an adequate deterrent and prevent the committing of crimes. The 1989 Principles offer guidance as to the best practice for preventing executions. It is proposed here that this guidance has a more general application to the key principles for criminal law. The key principles identified are as follows:

- a) the criminal law shall clearly set out offences;<sup>47</sup>
- b) the criminal law shall clearly set out the appropriate penalties, which take into account the seriousness of the offence;<sup>48</sup>
- c) the criminal law shall take into account whether exceptional circumstances such as a state of war or threat of war, internal political instability or any other public emergency may be invoked as a justification for an offence;<sup>49</sup>
- d) the Government shall ensure strict control, including a clear chain of command over all officials responsible for apprehension, arrest, detention, custody and imprisonment, as well as those officials authorised by law to use force and firearms;<sup>50</sup>
- e) clear guidelines shall be established which clearly set out powers of police officers and their superiors;<sup>51</sup>

45 Christopher Clarkson, *Understanding Criminal Law* (Sweet and Maxwell, 2005), 253.

46 Christopher Clarkson, *Understanding Criminal Law* (Sweet and Maxwell, 2005), 253.

47 Principle 1, *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, 24 May 1989.

48 Principle 1, *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, 24 May 1989.

49 Principle 1, *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, 24 May 1989.

50 Principle 2, *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, 24 May 1989.

51 Principle 3, *Principles on the Effective Prevention and Investiga-*

f) effective training of law enforcement officials on criminal law shall be provided;<sup>52</sup> and

g) Governments shall make every effort to prevent crime through measures such as public denunciation, improved access of complaints to intergovernmental and judicial bodies, and diplomatic intercession.<sup>53</sup>

In other words, the criminal law requires a mix of laws, regulations and codes of practice that are effective. This requires clarity, transparency and constant reconsideration. It also requires the relevant public authorities to be adequately trained and for the laws to be publically available.

Kuwait's law does include a penal code<sup>54</sup> and a code related to penal proceedings and trials,<sup>55</sup> which set out what constitutes an offence within Kuwait's jurisdiction and the basic requirements of fair procedure. It is recommended that certain provisions could be made clearer, such as in what circumstances the use of force can be used and to what extent, and that torture is absolutely prohibited. It is recommended that Kuwait's law should provide better regulation and guidance for its police officers. It is suggested that an example of how to do this is provided by the Code of Conduct 1979, the 1989 Principles, the Minnesota Protocol, the PACE and the RIPA.

## 3. Investigation

The UK House of Lords case, *Woolmington v Director of Public Prosecutions* [1935] established that:

*...throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to... the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.*<sup>56</sup>

tion of Extra-legal, Arbitrary and Summary Executions, 24 May 1989.

52 Principle 3, *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, 24 May 1989.

53 Principle 8, *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, 24 May 1989.

54 Law No 16, *The Penal Code* 1960; Law No 31, *Amending Certain Provisions of the Penal Code* No 16/1960 1970.

55 Law No 17, *The Penal Proceedings and Trials Code* 1960.

56 *Woolmington v Director of Public Prosecutions* [1935] AC 462, Viscount Sankey.

The words of Viscount Shankey were said in relation to the English Criminal law, but it is suggested that the 'golden thread' concept has a wider application and should be used as the basis for best practice in a State's criminal evidence system.

It is recommended that Kuwait's law should pay more heed to the golden thread of evidence that is required and the protection of this concept from the initial investigations through to the trial proceedings. The following sub-sections highlight the key principles that could be considered in order to accord with best international practice and to deliver on this recommendation at the investigation stage.

#### 4. Powers to Stop and Search

The primary purpose of stop and search powers 'is to enable officers to allay or confirm suspicions about individuals without exercising their power of arrest'.<sup>57</sup> It has been identified that 'stop and search can play an important role in the detection and prevention of crime, and using the powers fairly [and in the proper manner] makes them more effective',<sup>58</sup> secures public confidence and promotes community relations.<sup>59</sup> Also that evidence obtained from a search may be open to challenge if the powers are not properly observed.<sup>60</sup> Keeping that in mind, powers to stop and search 'must be used fairly, responsibly, with respect for people being searched and without lawful discrimination'.<sup>61</sup> Police officers should give due regard to the need to eliminate unlawful discrimination, harassment and victimisation.<sup>62</sup> They should also have regard for the need to safeguard and promote the welfare of all persons under the age of 18.<sup>63</sup>

Section 1 of the PACE provides police officers with the power to stop and search persons and vehicles on public property. The police officer must have 'reasonable grounds for suspecting that he will find

stolen or prohibited articles'.<sup>64</sup> According to sections 1(4) and 1(5) of the PACE a police officer may only search a person or vehicle in a private garden or yard if he has reasonable grounds for believing that the person does not reside in the dwelling and that the person or vehicle does not have the express or implied permission of the person who resides in the dwelling. If the police officer 'discovers an article which he has reasonable grounds for suspecting to be a stolen or prohibited article, he may seize it'.<sup>65</sup> A prohibited article is: a) an offensive weapon; b) an article that has been made or adapted to commit an offence or with the intention of committing an offence such as burglary, theft, fraud or criminal damage.<sup>66</sup> Other possible reasons to stop and search are:

- a) that incidents involving serious violence may take place in any locality in the police officer's area, and it is expedient to use these powers to prevent their occurrence;
- b) that persons are carrying dangerous instruments or offensive weapons without good reason in any locality in the police officer's area; or
- c) that an incident involving serious violence has taken place in the police officer's area, a dangerous instrument or offensive weapon used in the incident is being carried by a person in any locality in that area, and it is expedient to use these powers to find that instrument or weapon.<sup>67</sup>

Road checks can also be conducted for the purpose of ascertaining whether a vehicle is carrying:

- a) a person who has committed an offence other than a road traffic offence or a vehicle excise offence;
- b) a person who is a witness to such an offence;
- c) a person intending to commit such an offence; or
- d) a person who is unlawfully at large.<sup>68</sup>

The intrusion on the liberty of the person stopped or searched 'must be brief and detention for the purposes of a search must be taken at or near the location of the stop'.<sup>69</sup> A police officer 'must not search a person, even with his or her consent, where no power to search is applicable' or where the necessary legal power does not exist.<sup>70</sup> One exception to this is for

57 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 1.4.

58 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 1.3.

59 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 2.8A.

60 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 1.5.

61 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 1.1.

62 Section 149, Equality Act 2010.

63 Section 11, Children's Act 2004.

64 Section 3(1), Police and Criminal Evidence Act 1984.

65 Section 6, Police and Criminal Evidence Act 1984.

66 Sections 7 and 8, Police and Criminal Evidence Act 1984.

67 Section 60, Criminal Justice and Public Order Act 1994.

68 Section 4(1), Police and Criminal Evidence Act 1984.

69 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 1.2.

70 UK Home Office, 'Code A Revised – Code of Practice for the



searches of 'persons entering sports grounds or other premises carried out with their consent given as a condition of entry'.<sup>71</sup>

## Reasonable Grounds

In terms of what "reasonable grounds" requires it has been established that:

a) Firstly, the police officer must have formed a genuine suspicion in their own mind that they will find the object for which the search power being exercised allows them to search.

b) Secondly, the suspicion that the object will be found must be reasonable. This means that there must be an objective basis for that suspicion based on facts, information and/or intelligence which are relevant to the likelihood that the object in question will be found, so that a reasonable person would be entitled to reach the same conclusion based on the same facts and information and/or intelligence.<sup>72</sup>

The information and/or intelligence used as justification for exercising the powers to stop and search should be 'accurate and current'.<sup>73</sup> Targeted stop and searches in particular areas with specific crime problems or against identifiable groups or gangs that habitually carry prohibited articles are permitted.<sup>74</sup> However, reasonable suspicion cannot be supported on the basis of personal factors unless the police officers are acting on information or intelligence which provides a description of a person suspected of carrying a prohibited article. Therefore stop and searches cannot be carried out without reasonable grounds on the basis of:

a) a person's physical appearance – age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation, or the fact that the person is known to have a previous conviction; and

b) generalisations or stereotypical images that certain groups or categories of people are more likely to be involved in criminal activity.<sup>75</sup>

Reasonable grounds for suspicion based on behaviour, time and location can be used to justify exercising stop and search powers.<sup>76</sup> However, a police officer who forms the opinion that:

*...a person is acting suspiciously or that they appear to be nervous must be able to explain, with reference to specific aspects of the person's behaviour or conduct which they have observed, why they formed that opinion. A hunch or instinct which cannot be explained or justified to an objective observer can never amount to reasonable grounds.*<sup>77</sup>

The exercise of stop and search powers 'depends on the likelihood that the person searched is in possession of an item for which they may be searched; it does not depend on the person concerned being suspected of committing an offence in relation to the object of the search'.<sup>78</sup> Therefore, a police officer can carry out a stop and search even if they would not have the power of arrest. This extends to a child under the age of criminal responsibility (10 years in the UK) who is suspected of carrying a prohibited item, even if they knew they had it.<sup>79</sup>

Police officers may ask questions about the person's behaviour or presence in circumstances which gave rise to suspicion.<sup>80</sup> As a result of the questioning, the reasonable grounds for suspicions necessary to detain that person may be confirmed or, because of a satisfactory explanation, be dispelled.<sup>81</sup> Yet

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Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 1.5.

71 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 1.5.

72 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 2.2.

73 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 2.4.

74 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 2.4 and 2.4A.

75 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 2.2B.

76 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 2.6B.

77 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 2.6B.

78 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 2.2A.

79 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 2.2A.

80 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 2.9.

81 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 2.9.

reasonable grounds for suspicion cannot be provided retrospectively by such questioning or the individual's refusal to answer any questions asked.<sup>82</sup> In other words, 'there is no power to stop or detain a person in order to find grounds for a search'.<sup>83</sup>

### Steps Prior to Searches

Certain reasonable steps must be taken prior to any search of a detained person or attended vehicle. These are to give the person the following information:

- a) that they are being detained for the purposes of a search;
- b) the officer's name and the name of the police station to which the officer is attached;
- c) the legal search power which is being exercised;
- d) a clear explanation of:
  - i) the object of the search in terms of the article or articles for which there is a power to search; and
  - ii) the reason for the suspicion.
- e) that they are entitled to a copy of the record of the search if one is made if they ask within 3 months from the date of the search; and
- f) the individual's rights in these circumstances.<sup>84</sup>

It is preferable that the police officer conducting the search is in uniform.<sup>85</sup> If not in uniform, the police officer must show their warrant card to the person to be searched or in charge of the vehicle to be searched.<sup>86</sup>

In addition, if the person to be searched, or in charge of the vehicle to be searched, does not appear to understand what is being said due to hearing

difficulties or language difficulties, the police officer must take reasonable steps to bring information regarding the person's rights and any relevant provisions to his or her attention.<sup>87</sup> If the person to be searched is accompanied by someone, then the officer must try to establish whether that person can interpret or otherwise help the officer to give the required information.<sup>88</sup>

### Conduct of Searches

The PACE Code of Practice, as an example of best practice, states that 'all stops and searches must be carried out with courtesy, consideration and respect for the person concerned'.<sup>89</sup> Also 'every reasonable effort must be made to minimise the embarrassment that a person being searched may experience'.<sup>90</sup>

It is further stated that:

*...the cooperation of the person to be searched must be sought in every case, even if the person initially objects to the search. A forcible search may be made only if it has been established that the person is unwilling to cooperate or resists. Reasonable force may be used as a last resort if necessary to conduct a search or to detain a person or vehicle for the purposes of a search.<sup>91</sup>*

It is also identified that the length of time for which a person or vehicle may be detained 'must be reasonable and kept to a minimum'.<sup>92</sup> The thoroughness and extent of a search must depend on what is suspected of being carried, and by whom'.<sup>93</sup>

87 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 3.11.

88 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 3.11.

89 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 3.1.

90 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 3.1.

91 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 3.2.

92 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 3.3.

93 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 3.3.

82 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 2.9.

83 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 2.11.

84 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 3.8.

85 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 3.9.

86 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 3.8.

The search must also be 'carried out at or near the place where the person or vehicle was first detained'.<sup>94</sup>

In acknowledging the requirement to respect human dignity<sup>95</sup> and an individual's right to privacy,<sup>96</sup> the power to stop and search does not 'require a person to remove any clothing in public other than an outer coat, jacket or gloves'.<sup>97</sup> That is unless the person is wearing an item to conceal his or her identity.<sup>98</sup> In addition, a search in public of a person's clothing which has not been removed 'must be restricted to superficial examination of outer garments'. On this basis a police officer can: a) place his or her hand inside the pockets of the outer clothing; b) feel around the inside of collars, socks and shoes; and c) search a person's hair, if it is reasonably necessary in the circumstances to look for the object of the search or to remove and examine any item reasonably suspected to be the object of the search.<sup>99</sup>

If it is considered necessary, on the basis of reasonable grounds, to conduct a more thorough search this must be done out of the public view, for example in a police van or at a police station.<sup>100</sup> Any search involving the removal of more than an outer coat, jacket, gloves, headgear or footwear, or any other item concealing identity, can only be made by a police officer of the same sex as the person being searched and cannot be made in the presence of anyone of the opposite sex unless the person being searched specifically requests it.<sup>101</sup>

Searches involving exposure of intimate parts of the body 'must not be conducted as a routine extension of a less thorough search, simply because nothing is found in the course of the initial search'.<sup>102</sup> Such

searches must only be carried out at a nearby police station or other nearby location which is out of public view. Such searches should not be conducted in a police vehicle.<sup>103</sup>

## Recording Requirements

Section 3 of the PACE requires that a police officer makes a record concerning searches. The PACE's Codes of Practice elaborates what this entails. It states that if a search is carried out and does not result in the person searched or person in charge of the vehicle searched being arrested and taken to a police station, a record must be made of it, electronically or on paper, unless there are exceptional circumstances which make this wholly impracticable.<sup>104</sup> A record is required for each person and each vehicle searched, unless both a person and a vehicle are searched on the same grounds, in which case only one record is required.<sup>105</sup> The record must be made on the spot unless it is not practicable, in which case, the officer must make the record as soon as practicable after the search is complete.<sup>106</sup> If the record is made at the time of the search, the person being searched or who is in charge of the vehicle being searched must be asked if they want a copy. If they do they must be immediately given either a copy of the record or a receipt which explains how they can obtain a copy.<sup>107</sup> A police officer is not required to provide a copy of the full record or a receipt at the time if they are called to an incident of higher priority.<sup>108</sup>

For searches which result in an arrest, the police officer carrying out the search is responsible for ensuring that a record of the search is made as part of their custody

94 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 3.4.

95 Preamble and Article 10, International Covenant on Civil and Political Rights 1966; Article 20, Arab Charter on Human Rights 2004.

96 Article 17, International Covenant on Civil and Political Rights 1966; Article 16(8), Arab Charter on Human Rights 2004.

97 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 3.5.

98 Section 60AA, Criminal Justice and Public Order Act 1994.

99 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 3.5.

100 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 3.6.

101 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 3.6.

102 UK Home Office, 'Code A Revised – Code of Practice for the

Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 3.7.

103 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 3.7.

104 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 4.1.

105 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 4.5.

106 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 4.2.

107 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 4.2.

108 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 4.2A.

record.<sup>109</sup> The custody officer must then ensure that the person is asked if they want a copy of the record and, if they do, that they are given a copy as soon as practicable.<sup>110</sup>

The record of the search must always include the following information:

- a) a note of the self-defined ethnicity, and if different, the ethnicity as perceived by the officer making the search;
- b) the date, time and place the person or vehicle was searched;
- c) the object of the search in terms of the article or articles for which there is a power to search;
- d) the nature of the powers, the authorisation and the fact that it has been given;
- e) the identity of the police officer carrying out the search. If there is reason to believe that this would endanger the police officer, his or her warrant or other identification number and duty station should be given;
- f) the grounds for making a search. This should reference the information and/or intelligence or specific behaviour that lead to the search.<sup>111</sup>

There is no requirement to record the name, address and date of birth of the person searched or the person in charge of a vehicle being searched. The person is under no obligation to provide this information and they should not be asked to provide it for the purpose of completing the record.<sup>112</sup>

If a person is detained for the purposes of performing a search, but the need to search is eliminated, a search should not be carried out and a record is not required.<sup>113</sup> If an unattended vehicle has been searched, or anything in or on it, the police officer must leave a notice recording the fact that it has been searched.<sup>114</sup> The notice must include the name of the

police station to which the police officer is attached and state where a copy of the record of the search can be obtained.<sup>115</sup> The vehicle must be left secure, if practicable.<sup>116</sup>

## 5. Training and Communication

Police officers should be well-informed about local crime patterns.<sup>117</sup> They should also be kept informed of up-to-date and accurate intelligence or information.<sup>118</sup> It is the duty of senior police officers to ensure that 'those under their command who exercise stop and search powers have access to such information, and the [police officers] exercising the powers have a duty to acquaint themselves with that information'.<sup>119</sup>

### Accountability

Police officers may be required to justify the use or authorisation of stop and search powers, in relation to both individual searches and the overall pattern of their activity, to their supervisory officers or in court.<sup>120</sup> Police officers must also be able to explain their actions to the member of the public searched.<sup>121</sup> It is best practice to establish in law and implement in practice that any misuse of the powers to stop and search can lead to disciplinary action.<sup>122</sup>

Supervising police officers must:

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Encounters' (The Stationery Office, 2014), para 4.8.

115 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 4.9.

116 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 4.10.

117 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 2.8A.

118 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 2.8A.

119 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 2.8A.

120 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 1.4.

121 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 1.4.

122 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 1.4.

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109 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 4.2B.

110 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 4.2B.

111 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), paras 4.3, 4.4 and 4.7.

112 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 4.3A.

113 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 4.7.

114 UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public



- a) monitor the use of stop and search powers;
- b) consider whether there is any evidence that stop and search powers are being exercised on the basis of stereotyped images or inappropriate generalisations;
- c) satisfy themselves that the practice of police officers under their supervision is appropriate;
- d) examine whether the records reveal any trends or patterns which give cause for concern, and if so, take the appropriate action to address this.<sup>123</sup>

Senior police officers with area or force-wide responsibilities must also monitor the broader use of stop and search powers and, where necessary, take action at the relevant level.<sup>124</sup>

Supervision and monitoring must be supported by a compilation of comprehensive statistical records of stops and searches at force, area and local level. Any disproportionate use of powers should be identified and investigated.<sup>125</sup>

## 6. Powers of Entry, Search and Seizure

In line with the right to privacy,<sup>126</sup> 'powers of entry, search and seizure should be fully and clearly justified before use'.<sup>127</sup> Police officers should also consider 'if the necessary objectives can be met by less intrusive means'.<sup>128</sup> This requires police officers to use these powers 'fairly, responsibly, with respect for people who occupy premises being searched or are in charge of property being seized without lawful discrimination'.<sup>129</sup> This includes police officers having a duty to carry these powers in a way which eliminates 'unlawful

discrimination, harassment and victimisation'.<sup>130</sup> Therefore in all cases, police officers should:

- a) exercise their powers courteously and with respect for persons and property; and
- b) only use reasonable force when this is considered necessary and proportionate to the circumstances.<sup>131</sup>

## Search Warrants

Section 8(1) of the PACE states that a judge may issue a warrant authorising a police officer to enter and search a premises if there are reasonable grounds for believing that:

- a) an indictable offence has been committed;
- b) that there is material on premises which is likely to be of substantial value (whether by itself or together with other material) to the investigation of the offence;
- c) the material is likely to be relevant evidence (i.e. anything that would be admissible in evidence at a trial for the offence<sup>132</sup>); and
- d) it does not consist of or include items subject to legal privilege, excluded material or special procedure material.

This is subject to the conditions that:

- a) it is not practicable to communicate with any person entitled to grant entry to the premises;
- b) it is practicable to communicate with a person entitled to grant entry to the premises but it is not practicable to communicate with any person entitled to grant access to the evidence;
- c) entry to the premises will not be granted unless a warrant is produced;
- d) the purposes of the search may be frustrated or seriously prejudiced unless a constable arriving at the premises can secure immediate entry to them.<sup>133</sup>

The warrant can be for one or more premises and can be for multiple entries, if the judge is satisfied that this is necessary.<sup>134</sup>

## Before Making an Application

The police officer must take reasonable steps to check that the information being used to justify an application

<sup>123</sup> UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 5.1.

<sup>124</sup> UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 5.2.

<sup>125</sup> UK Home Office, 'Code A Revised – Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search, Police Officers and Police Staff of Requirements to Record Public Encounters' (The Stationery Office, 2014), para 5.3.

<sup>126</sup> Article 17, International Covenant on Civil and Political Rights 1966; Article 16(8), Arab Charter on Human Rights 2004.

<sup>127</sup> UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 1.3.

<sup>128</sup> UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 1.3.

<sup>129</sup> UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 1.3A.

<sup>130</sup> UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 1.3A.

<sup>131</sup> UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 1.4.

<sup>132</sup> Section 8(4), Police and Criminal Evidence Act 1984.

<sup>133</sup> Section 8(3), Police and Criminal Evidence Act 1984.

<sup>134</sup> Sections 1(A) and 1(B), Police and Criminal Evidence Act 1984.

is 'accurate, recent and was not provided maliciously or irresponsibly'.<sup>135</sup> Corroboration must be sought for an anonymous source; otherwise an application should not be made.<sup>136</sup> The police officer should make reasonable enquiries to establish information about:

- a) the nature of the articles concerned and their location;
- b) the likely occupier of the premises;
- c) the nature of the premises;
- d) whether the premises have been searched previously and how recently; and
- e) any other relevant information.<sup>137</sup>

The application must be supported by a superior officer.<sup>138</sup> The police officer shall consult the local community liaison officer, if it is believed that the search will have an adverse effect on relations between the police and the community. This will be done before the search or, in urgent cases, as soon as practicable after the search.<sup>139</sup>

### Making an Application

A search warrant application must be supported in writing. It must:

- a) state if the warrant is for one or more set of premises;
- b) identify the premises to be searched;
- c) state the object of the search;
- d) the grounds for the search
- e) state if it is for more than one entry and, if so, whether it is for a specified maximum or for unlimited entries;
- f) state whether there are legal grounds to believe that the items are subject to legal privilege or special procedure material
- g) if applicable, a request for the warrant to authorise company for the police officer executing the warrant.<sup>140</sup>

<sup>135</sup> UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 3.1.

<sup>136</sup> UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 3.1.

<sup>137</sup> UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), paras 3.2 and 3.3.

<sup>138</sup> UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 3.4.

<sup>139</sup> UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 3.5.

<sup>140</sup> UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property

If a warrant application is refused, a further application cannot be made for those premises unless supported by additional grounds.<sup>141</sup>

### Time of Search

Searches under warrant 'must be made within three calendar months of the date of the warrant's issue'.<sup>142</sup> Searches 'must be made at a reasonable hour, unless this might frustrate the purpose of the search'.<sup>143</sup> Multiple searches are only permitted if stated in the search warrant.<sup>144</sup> Only premises identified on the search warrant may be searched.<sup>145</sup>

### Gaining Entry

To gain entry the police officer must first try to communicate with the person entitled to grant entry.<sup>146</sup> This includes explaining the authority under which entry is sought and requesting the occupier to allow entry.<sup>147</sup> That is unless:

- a) the search premises are unoccupied;
- b) the occupier and any other person entitled to grant access are absent;
- c) there are reasonable grounds for believing that alerting the occupier or any other person entitled to grant access would frustrate the object of the search or endanger others.<sup>148</sup>

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Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 3.6.

<sup>141</sup> UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 3.8.

<sup>142</sup> UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 6.1.

<sup>143</sup> UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 6.2.

<sup>144</sup> UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 6.3A.

<sup>145</sup> UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 6.3B.

<sup>146</sup> UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 6.4.

<sup>147</sup> UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 6.4.

<sup>148</sup> UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery

If the premises are occupied, before the search begins the police officer must:

- a) identify him or herself, show their warrant card (if not in uniform) and state the purpose of and grounds for the search;
- b) identify and introduce any person accompanying them on the search (such persons should carry identification for production on request) and briefly describe that person's role in the process.<sup>149</sup>

Reasonable and proportionate force should only be used if necessary to enter premises.<sup>150</sup> It is only necessary if, after the police officer is satisfied that the premises are those specified in any warrant, that:

- a) the occupier or any other person entitled to grant access has refused entry; or
- b) it is impossible to communicate with the occupier or any other person entitled to grant access.<sup>151</sup>

If practicable the occupier will be given a copy of the notice.<sup>152</sup>

## Conduct of Searches

In conducting a search the premises 'may be searched only to the extent necessary to achieve the purpose of the search, having regard to the size and nature of whatever is sought'.<sup>153</sup> A search must cease once the object of the search has been achieved<sup>154</sup> or the police officer in charge is satisfied that whatever is being sought is not

on the premises.<sup>155</sup> Reflecting the right to property<sup>156</sup> and the right to privacy,<sup>157</sup> searches 'must be conducted with due consideration' for these rights and 'with no more disturbance than necessary'.<sup>158</sup> A friend, neighbour or other person 'must be allowed to witness the search if the occupier wishes', unless the police officer in charge has 'reasonable grounds for believing the presence of the person asked for would seriously hinder the investigation or endanger others'.<sup>159</sup> A person is 'not required to be cautioned prior to being asked questions that are solely necessary for the purpose of furthering the proper and effective conduct of a search'.<sup>160</sup>

If the premises have been entered by force, before leaving the police officer in charge must make sure that the property is secure by 'arranging for the occupier or their agent to be present', or 'any other appropriate means'.<sup>161</sup>

## Recording

Written records not made in the search record should be made in the recording officer's pocket book or on forms provided for the purpose.<sup>162</sup> A search register 'will be maintained at each sub-divisional or equivalent police station'. All required search records 'shall be made, copied or referred to in the register'.<sup>163</sup>

## Entry and Search without Search Warrant

Sections 17 and 18 of the PACE allow for powers of

<sup>155</sup> UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 6.9B.

<sup>156</sup> Article 18(1), Constitution of Kuwait 1962; Article 17, International Covenant on Civil and Political Rights 1966; Article 31, Arab Charter on Human Rights 2004.

<sup>157</sup> Article 17, International Covenant on Civil and Political Rights 1966; Article 16(8), Arab Charter on Human Rights 2004.

<sup>158</sup> UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 6.9B.

<sup>159</sup> UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 6.11.

<sup>160</sup> UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 6.12.

<sup>161</sup> UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 6.13.

<sup>162</sup> UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 2.8.

<sup>163</sup> UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 9.1.

Office, 2013), para 6.4.

<sup>149</sup> UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 6.5.

<sup>150</sup> UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 6.6.

<sup>151</sup> UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 6.6.

<sup>152</sup> UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 6.7-6.8.

<sup>153</sup> UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 6.9.

<sup>154</sup> UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 6.9A.

entry and search without a search warrant in a number of scenarios:

- 1) for the purposes of executing a warrant of arrest;<sup>164</sup>
- 2) for the purposes of recapturing any person whatever who is unlawfully at large and whom the police officer is pursuing;<sup>165</sup>
- 3) for the purposes of saving life or limb or preventing serious damage to property;<sup>166</sup>
- 4) for the purposes of obtaining evidence related to a person's arrest.<sup>167</sup>

The police officer must have reasonable grounds for believing that the person whom he or she is seeking or that the evidence being sought is on the premises.<sup>168</sup> Written authority from a superior police officer must also be given and should be officially recorded.<sup>169</sup>

### Entry and Search with Consent

A police officer can exercise powers of entry and search with the consent of the person entitled to grant entry.<sup>170</sup> The police officer 'must take the necessary steps to be satisfied that the person is in the position to give consent'.<sup>171</sup> If the property is a lodging house, hostel or similar accommodation, 'every reasonable effort should be made to obtain the consent of the tenant, lodger or occupier. A search should not be made solely on the basis of the landlord's consent'.<sup>172</sup> The police officer must give the person as specific information as possible, such as what is being sought and the parts of the premises to be searched.<sup>173</sup> The person is not obliged to give consent and can withdraw consent at any time.<sup>174</sup> The person giving

consent should be informed of this.<sup>175</sup> Consent should not be sought if it would cause 'disproportionate inconvenience to the person concerned'.<sup>176</sup> The police officer should also not act on consent 'given under duress or withdrawn before the search is completed'.<sup>177</sup>

### Seizure

A police officer who is lawfully on any premises may seize anything which is on the premises if he or she has 'reasonable grounds' for believing that:

- a) it has been obtained in consequence of the commission of an offence;<sup>178</sup>
- b) it is necessary to seize it in order to prevent it being concealed, lost, damaged, altered or destroyed;<sup>179</sup> and
- c) it is evidence in relation to an offence which he or she is investigating or any other offence.<sup>180</sup>

This extends to:

any information which is stored in any electronic form and is accessible from the premises to be produced in a form in which it can be taken away and in which it is visible and legible, or from which it can readily be produced in a visible and legible form.<sup>181</sup>

No item may be seized if there are reasonable grounds for believing that it is subject to legal privilege.<sup>182</sup> A police officer may decide that it is not appropriate to seize property 'because of an explanation from the person holding it but may nevertheless have reasonable grounds for believing it was obtained in consequence of an offence of some person'.<sup>183</sup> In

164 Section 17(1)(a), Police and Criminal Evidence Act 1984.

165 Section 17(1)(d), Police and Criminal Evidence Act 1984.

166 Section 17(1)(e), Police and Criminal Evidence Act 1984.

167 Section 18(1), Police and Criminal Evidence Act 1984.

168 Section 17(2)(a), Police and Criminal Evidence Act 1984.

169 UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 4.3.

170 UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 5.1.

171 UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 5.1.

172 UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 5A.

173 UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 5.2.

174 UK Home Office, 'Code B Revised – Code of Practice for

Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 5.2.

175 UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 5.2.

176 UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 5.4.

177 UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 5.3.

178 Section 19(2)(a), Police and Criminal Evidence Act 1984.

179 Sections 19(2)(b) 19(3)(b), Police and Criminal Evidence Act 1984.

180 Section 19(3)(a), Police and Criminal Evidence Act 1984.

181 Sections 19(4) and 20, Police and Criminal Evidence Act 1984.

182 UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 7.2.

183 UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery



such circumstances the police officer 'should identify the property to the holder, inform the holder of their suspicions and explain the holder may be liable to civil and criminal proceedings if they dispose of, alter or destroy the property'.<sup>184</sup>

### Seize Property to Sift and Examine Elsewhere

Sections 50 and 51 of the UK Criminal Justice and Police Act 2001 give police officers limited powers to seize property from premises or persons so that they can sift and examine it elsewhere.<sup>185</sup> These powers must only be used when it is 'essential' and that 'they do not remove any more material than necessary'.<sup>186</sup> It should be considered whether removing copies and images would be more appropriate.<sup>187</sup> Reasonable requests from interested persons to be present during the examination of the removed items must be facilitated unless the request is unreasonable, will lead to unreasonable delay or will harm the investigation process.<sup>188</sup> Removed property must be separate from the rest of seized property and returned as soon as reasonably practicable.<sup>189</sup> The police officer in charge is responsible for ensuring property is 'properly secured'.<sup>190</sup> The occupier or person from whom the property is being seized will be given written notice of the property being seized. This includes:

- a) specifying what is being seized;
- b) specifying the grounds and powers for the seizure;
- c) setting out the grounds for its return and the duty of police officers to secure the property; and
- d) specifying the name and address of the person

to whom the notice must be given and who can make an application to be in attendance at the initial examination of the property.<sup>191</sup>

If the occupier is not present, but there is someone in charge of the premises, the notice shall be given to them. If no suitable person is available, the notice should be left in a prominent place on the premises or attached to the exterior of the premises.<sup>192</sup>

### Retention

Anything seized may only be retained 'for as long as is necessary'. The purposes for retention include:

- a) for use as evidence at a trial for an offence;
- b) to facilitate the use in any investigation or proceedings of anything to which it is inextricably linked;
- c) for forensic examination or other investigation in connection with an offence;
- d) in order to establish its lawful owner when there are reasonable grounds for believing it has been stolen or obtained by the commission of an offence.<sup>193</sup>

Property 'shall not be retained if a copy or image would be sufficient'.<sup>194</sup>

### Rights of Owners

The occupier of the premises or the custodian of the article immediately before its seizure can request a record of what was seized.<sup>195</sup> The police officer must provide the requested record 'within a reasonable time'.<sup>196</sup> The occupier of the premises or custodian of the article immediately before its seizure can request access to it under the supervision of a police officer.<sup>197</sup> A photograph or copy can also be made under the same conditions.<sup>198</sup> Access and copies can be denied if the police officer in charge has 'reasonable grounds' for believing that to do so would prejudice:

191 UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 7.12.

192 UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 7.13.

193 UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 7.14.

194 UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 7.15.

195 Section 21(1), Police and Criminal Evidence Act 1984.

196 Section 21(2), Police and Criminal Evidence Act 1984.

197 Section 21(3), Police and Criminal Evidence Act 1984.

198 Sections 21(4) and 21(5), Police and Criminal Evidence Act 1984.

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Office, 2013), para 7.4.

184 UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 7.4.

185 UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 7.7.

186 UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 7.7.

187 UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 7.7.

188 UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 7.8.

189 UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 7.9.

190 UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 7.11.

a) that investigation;  
b) the investigation of an offence other than the offence for the purposes of investigating which the thing was seized; or

c) any criminal proceedings which may be brought as a result of –

- i) the investigation of which he or she is in charge; or
- ii) any such investigation of an offence other than the offence for the purposes of investigating which the thing was seized.<sup>199</sup>

## Recording

On arrival at a police station, the police officer in charge of the search shall be made or have made a record of the search.<sup>200</sup> This should include:

- a) the address of the searched premises;
- b) the date, time and duration of the search;
- c) the authority used for the search;
- d) the names of the police officers involved;
- e) the names of any people on the premises if they are known
- f) any grounds for refusing the occupier's request to have someone present during the search;
- g) a list of any articles seized or the location of a list and, if not covered by a warrant, the grounds for their seizure;
- h) whether force was used and the reason;
- i) details of any damage caused during the search and the circumstances;
- j) if applicable, the reason it was not practicable to give the occupier notice;
- k) if the occupier was not present, the place where copies of the notice and search warrant were left on the premises.<sup>201</sup>

## Surveillance

In the interests of protecting an individual's right to privacy,<sup>202</sup> it is important that surveillance is effectively regulated.<sup>203</sup> Using the UK's RIPA as an example, the following sub-sections consider the best practice for ensuring the required effective regulation.

<sup>199</sup> Section 21(8), Police and Criminal Evidence Act 1984.

<sup>200</sup> UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 8.1.

<sup>201</sup> UK Home Office, 'Code B Revised – Code of Practice for Searches of Premises by Police Officers and the Seizure of Property Found by Police Officers on Persons or Premises' (The Stationery Office, 2013), para 8.1.

<sup>202</sup> Article 17, International Covenant on Civil and Political Rights 1966; Article 16(8), Arab Charter on Human Rights 2004.

<sup>203</sup> UK Home Office, 'Covert Surveillance and Property Interference: Code of Practice' (The Stationery Office, 2014), para 1.13.

## Unlawful Interception

International best practice states that:

...it shall be an offence for a person intentionally and without lawful authority to intercept, at any place [within the jurisdiction], any communication in the course of its transmission by means of:

- a) a public postal service;
- b) a public telecommunication system; or
- c) a private telecommunication system.<sup>204</sup>

This extends to modifying or monitoring a communication or system.<sup>205</sup>

## Lawful Interception without an Interception Warrant

Lawful interception without an interception warrant may be given if the:

...conduct by any person consisting in the interception of a communication is authorised if the communication is one which, of which that person has reasonable grounds for believing, is both:

- a) a communication sent by a person who has consented to the interception; and
- b) a communication the intended recipient of which has so consented.<sup>206</sup>

## Interception Warrants

An interception warrant may be authorised if it is 'necessary':

- a) in the interests of national security;
- b) for the purposes of preventing or detecting serious crime;
- c) for the purpose of safeguarding the economic well-being of the jurisdiction;
- d) for the purpose international mutual assistance.<sup>207</sup>

Following international best practice, the authoriser is the Secretary of State, or the equivalent.<sup>208</sup> The application should also only be submitted by top-level law enforcers, such as Chief of the Secret Intelligence Service.<sup>209</sup>

The warrant should record the subject of the warrant and the source of authorisation.<sup>210</sup> The warrant is for a set period of time, which can be renewed if it

<sup>204</sup> Sections 1(1) and 2(1), Regulation of Investigatory Powers Act 2000.

<sup>205</sup> Section 2(2), Regulation of Investigatory Powers Act 2000.

<sup>206</sup> Section 3(1), Regulation of Investigatory Powers Act 2000.

<sup>207</sup> Section 5(3), Regulation of Investigatory Powers Act 2000.

<sup>208</sup> Section 5(1), Regulation of Investigatory Powers Act 2000.

<sup>209</sup> Section 6(1), Regulation of Investigatory Powers Act 2000.

<sup>210</sup> Sections 7 and 8, Regulation of Investigatory Powers Act 2000.

is believed to be necessary.<sup>211</sup> The warrant can be modified where necessary.<sup>212</sup> All reasonably practicable steps must be taken to implement the warrant.<sup>213</sup>

### Interception Capability and Costs

International best practice suggests that grants are made available to postal services and telecommunications services for the costs incurred, or likely to be incurred, when implementing interception warrants.<sup>214</sup>

### Restrictions on Use of Intercepted Material

International best practice requires that, where intercepted material or any related communications data is concerned:

- a) the number of persons to whom any of the material or data is disclosed or otherwise made available,
- b) the extent to which any of the material or data is disclosed or otherwise made available,
- c) the extent to which any of the material or data is copied, and
- d) the number of copies that are made,

is limited to the minimum that is necessary for the authorised purposes.<sup>215</sup>

Certain matters about information obtained through surveillance should be kept secret, unless the disclosure is adequately authorised. These matters are:

- a) the existence and contents of the warrant;
- b) the details of the issue of the warrant and of any renewal or modification of the warrant or of any such certificate;
- c) the existence and contents of any requirement to provide assistance with giving effect to the warrant;
- d) the steps taken in pursuance of the warrant or of any such requirements; and
- e) everything in the intercepted material, together with any related communications data<sup>216</sup>

### Acquisition and Disclosure of Communications Data

International best practice allows for any communications data to be obtained if it is believed to be necessary on the grounds of:

- a) national security;

<sup>211</sup> Section 9, Regulation of Investigatory Powers Act 2000.

<sup>212</sup> Section 10, Regulation of Investigatory Powers Act 2000.

<sup>213</sup> Sections 11 and 12, Regulation of Investigatory Powers Act 2000.

<sup>214</sup> Section 14, Regulation of Investigatory Powers Act 2000.

<sup>215</sup> Section 15(2), Regulation of Investigatory Powers Act 2000.

<sup>216</sup> Section 19, Regulation of Investigatory Powers Act 2000.

- b) preventing or detecting crime or of preventing disorder;
- c) economic well-being of the jurisdiction;
- d) public safety;
- e) protecting public health;
- f) assessing or collecting any tax, duty, levy or other imposition, contribution or charge payable to a government department; or
- g) in an emergency, of preventing death or injury or any damage to a person's physical or mental health, or of mitigating any injury or damage to a person's physical or mental health.<sup>217</sup>

In order to obtain the communications data, the relevant authorisation must be given.<sup>218</sup> Authorisation must be set out in writing. It must state the conduct and material that is authorised and the source of the authorisation.<sup>219</sup> The costs incurred in complying with the authorisation should be covered where 'appropriate'.<sup>220</sup>

### Surveillance and Covert Human Intelligence Sources

International best practice requires that authorisation is given for directed surveillance, intrusive surveillance, and the conduct and use of covert human intelligence sources.<sup>221</sup>

#### Directed Surveillance

Authorisation for directed surveillance should only be given if it is believed that the authorisation is necessary and proportionate.<sup>222</sup> The grounds for authorisation must be based on:

- a) national security;
- b) preventing and detecting crime or of preventing disorder;
- c) economic well-being within the jurisdiction;
- d) public safety;
- e) protecting public health; or
- f) assessing or collecting any tax, duty, levy or other imposition, contribution or charge payable to a government department<sup>223</sup>

The conduct used to carry out directed surveillance must be limited to the description and purpose set out in the authorisation.<sup>224</sup> Authorisation must be given by the relevant person.<sup>225</sup>

<sup>217</sup> Section 22, Regulation of Investigatory Powers Act 2000.

<sup>218</sup> Section 22(3), Regulation of Investigatory Powers Act 2000.

<sup>219</sup> Section 23(1), Regulation of Investigatory Powers Act 2000.

<sup>220</sup> Section 24, Regulation of Investigatory Powers Act 2000.

<sup>221</sup> Sections 26 and 27, Regulation of Investigatory Powers Act 2000.

<sup>222</sup> Section 28(2), Regulation of Investigatory Powers Act 2000.

<sup>223</sup> Section 28(3), Regulation of Investigatory Powers Act 2000.

<sup>224</sup> Section 28(4), Regulation of Investigatory Powers Act 2000.

<sup>225</sup> Section 30(1), Regulation of Investigatory Powers Act 2000.

## Covert Human Intelligence Sources

Authorisation for covert human intelligence sources should only be given if it is believed that the authorisation is necessary and proportionate.<sup>226</sup> The grounds for authorisation must be based on:

- a) national security;
- b) preventing and detecting crime or of preventing disorder;
- c) economic well-being within the jurisdiction;
- d) public safety;
- e) protecting public health; or
- f) assessing or collecting any tax, duty, levy or other imposition, contribution or charge payable to a government department.<sup>227</sup>

The conduct used to carry out directed surveillance must be limited to the description and purpose set out in the authorisation.<sup>228</sup> Authorisation must be given by the relevant person.<sup>229</sup>

## Intrusive Surveillance

Authorisation for intrusive surveillance should only be given if it is believed that the authorisation is necessary and proportionate.<sup>230</sup> The grounds for authorisation must be based on:

- a) national security;
- b) preventing and detecting crime or of preventing disorder; or
- c) economic well-being within the jurisdiction.<sup>231</sup>

Consideration should be given to whether the information 'could be reasonably obtained by other means'.<sup>232</sup> The conduct used to carry out directed surveillance must be limited to the description and purpose set out in the authorisation.<sup>233</sup>

## Police and Revenue Customs

Authorisation by police and revenue customs must be given by the relevant person.<sup>234</sup> It must be set out in writing.<sup>235</sup> It must state the conduct and material that is authorised and the source

of the authorisation.<sup>236</sup> The authorisation can be appealed against.<sup>237</sup>

## Grant, Renewal and Duration

Authorisation can be granted orally in 'any urgent case', but must be in writing in 'any other case'.<sup>238</sup> The period of authorisation depends on the circumstances.<sup>239</sup> Common periods are 72 hours, three months or 12 months.<sup>240</sup> These periods can be subject to renewal.<sup>241</sup> Authorisations can also be cancelled by the relevant authority.<sup>242</sup>

## Investigation of Electronic Data Protected by Encryption

Authorisation may be given to impose a disclosure requirement on any person reasonably believed to be in possession of electronic data protected by encryption where disclosure is 'necessary on grounds' of:

- a) national security;
- b) purposes of preventing or detecting crime; or
- c) economic well-being of the jurisdiction.<sup>243</sup>

Authorisation must be set out in writing.<sup>244</sup> It must state the protected information to which the authorisation relates, the reason for the authorisation and the source of the authorisation.<sup>245</sup> The costs incurred in complying with the authorisation should be covered where 'appropriate'.<sup>246</sup>

It is an offence to not comply with this notice,<sup>247</sup> unless there is sufficient evidence that the person was not in possession of the key at the time of the notice.<sup>248</sup> This must be proved beyond reasonable doubt.<sup>249</sup> If required, a person must 'keep secret the giving of the notice, its contents and the things done in pursuance of it'.<sup>250</sup>

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236 Sections 35 and 36, Regulation of Investigatory Powers Act 2000.

237 Section 38, Regulation of Investigatory Powers Act 2000.

238 Section 43(1), Regulation of Investigatory Powers Act 2000.

239 Section 43(3), Regulation of Investigatory Powers Act 2000.

240 Section 43(3), Regulation of Investigatory Powers Act 2000.

241 Section 43(4), Regulation of Investigatory Powers Act 2000.

242 Section 45(1), Regulation of Investigatory Powers Act 2000.

243 Sections 49(1) and 49(3), Regulation of Investigatory Powers Act 2000.

244 Section 49(4), Regulation of Investigatory Powers Act 2000.

245 Section 23(1), Regulation of Investigatory Powers Act 2000.

246 Section 52, Regulation of Investigatory Powers Act 2000.

247 Section 53(1), Regulation of Investigatory Powers Act 2000.

248 Section 53(3), Regulation of Investigatory Powers Act 2000.

249 Section 53(3), Regulation of Investigatory Powers Act 2000.

250 Section 54, Regulation of Investigatory Powers Act 2000.

226 Section 29(2), Regulation of Investigatory Powers Act 2000.

227 Section 29(3), Regulation of Investigatory Powers Act 2000.

228 Section 29(4), Regulation of Investigatory Powers Act 2000.

229 Section 30(1), Regulation of Investigatory Powers Act 2000.

230 Section 32(2), Regulation of Investigatory Powers Act 2000.

231 Section 32(3), Regulation of Investigatory Powers Act 2000.

232 Section 32(4), Regulation of Investigatory Powers Act 2000.

233 Section 32(5), Regulation of Investigatory Powers Act 2000.

234 Sections 33 and 34, Regulation of Investigatory Powers Act 2000.

235 Sections 35 and 36, Regulation of Investigatory Powers Act 2000.

## 7. Scene Investigations

The UN's Minnesota Protocol<sup>251</sup> provides a comprehensive checklist for conducting scene investigations and sets out the minimum standards demanded for international recognised best practice. This Protocol relates to extra-legal, arbitrary and summary executions, but it is suggested that the key principles contained within have a wider application and can be applied to all autopsies and forensic examinations.

### Scene Investigation

Regarding scene investigation the Minnesota Protocol states:

...the prosecutor(s) and medical investigators should have the right of access to the scene where the body is found. The medical personnel should be notified immediately to assure that no alteration of the body has occurred. If access to the scene was denied, if the body was altered or if information was withheld, this should be stated in the prosecutor's report.

A system for co-ordination between the medical and non-medical investigators (e.g. law enforcement agencies) should be established. This should address such issues as how the prosecutor will be notified and who will be in charge of the scene. Obtaining certain types of evidence is often the role of the non-medical investigators, but the medical investigators who have access to the body at the scene of death should perform the following steps:

- (a) Photograph the body as it is found and after it has been moved;
- (b) Record the body position and condition, including body warmth or coolness, lividity and rigidity;
- (c) Protect the deceased's hands, e.g. with paper bags;
- (d) Note the ambient temperature. In cases where the time of death is an issue, rectal temperature should be recorded and any insects present should be collected for forensic entomological study. Which procedure is applicable will depend on the length of the apparent post-mortem interval;
- (e) Examine the scene for blood, as this may be useful in identifying suspects;
- (f) Record the identities of all persons at the scene;
- (g) Obtain information from scene witnesses, including those who last saw the decedent alive, and when, where and under what

circumstances. Interview any emergency medical personnel who may have had contact with the body;

- (h) Obtain identification of the body and other pertinent information from friends or relatives. Obtain the deceased's medical history from his or her physician(s) and hospital charts, including any previous surgery, alcohol or drug use, suicide attempts and habits;
- (i) Place the body in a body pouch or its equivalent. Save this pouch after the body has been removed from it;
- (j) Store the body in a secure refrigerated location so that tampering with the body and its evidence cannot occur;

- (k) Make sure that projectiles, guns, knives and other weapons are available for examination by the responsible medical personnel;
- (l) If the decedent was hospitalized prior to death, obtain admission or blood specimens and any X-rays, and review and summarize hospital records; and
- (m) Before beginning the autopsy, become familiar with the types of torture or violence that are prevalent in that country or locale.<sup>252</sup>

### Autopsies

Regarding autopsies the Minnesota Protocol states that the following Protocol should be followed:

- (a) Record the date, starting and finishing times, and place of the autopsy (a complex autopsy may take as long as an entire working day);
- (b) Record the name(s) of the prosecutor(s), the participating assistant(s), and all other persons present during the autopsy, including the medical and/or scientific degrees and professional, political or administrative affiliations(s) of each. Each person's role in the autopsy should be indicated, and one person should be designated as the principal prosecutor who will have the authority to direct the performance of the autopsy. Observers and other team members are subject to direction by, and should not interfere with, the principal prosecutor. The time(s) during the autopsy when each person is present should be included. The use of a "sign-in" sheet is recommended;
- (c) Adequate photographs are crucial for thorough documentation of autopsy findings:
  - (i) Photographs should be in colour (transparency or negative/ print), in focus, adequately illuminated, and taken by a professional or good quality camera. Each

<sup>251</sup> UN Doc E/ST/CSDHA/12 (1991), United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions 1991, Minnesota Protocol.

<sup>252</sup> UN Doc E/ST/CSDHA/12 (1991), United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions 1991, Minnesota Protocol, para B.1.



photograph should contain a ruled reference scale, an identifying case name or number, and a sample of standard grey. A description of the camera (including the lens “f-number” and focal length), film and the lighting system must be included in the autopsy report. If more than one camera is utilized, the identifying information should be recorded for each. Photographs should also include information indicating which camera took each picture, if more than one camera is used. The identity of the person taking the photographs should be recorded;

(ii) Serial photographs reflecting the course of the external examination must be included. Photograph the body prior to and following undressing, washing or cleaning and shaving;

(iii) Supplement close-up photographs with distant and/or immediate range photographs to permit orientation and identification of the close-up photographs;

(iv) Photographs should be comprehensive in scope and must confirm the presence of all demonstrable signs of injury or disease commented upon in the autopsy report;

(v) Identifying facial features should be portrayed (after washing or cleaning the body), with photographs of a full frontal aspect of the face, and right and left profiles of the face with hair in normal position and with hair retracted, if necessary, to reveal the ears;

(d) Radiograph the body before it is removed from its pouch or wrappings. X-rays should be repeated both before and after undressing the body. Fluoroscopy may also be performed. Photograph all X-ray films;

(i) Obtain dental X-rays, even if identification has been established in other ways;

(ii) Document any skeletal system injury by X-ray. Skeletal X-rays may also record anatomic defects or surgical procedures. Check especially for fractures of the fingers, toes and other bones in the hands and feet. Skeletal X-rays may also aid in the identification of the deceased, by detecting identifying characteristics, estimating age and height, and determining sex and race. Frontal sinus films should also be taken, as these can be particularly useful for identification purposes;

(iii) Take X-rays in gunshot cases to aid in locating-the projectile(s). Recover, photograph and save any projectile or major projectile fragment that is seen on an X-ray. Other radio-opaque objects (pacemakers, artificial joints or valves, knife fragments etc.) documented with

X-rays should also be removed, photographed and saved;

(iv) Skeletal X-rays are essential in children to assist in determining age and developmental status;

(e) Before the clothing is removed, examine the body and the clothing. Photograph the clothed body. Record any jewellery present;

(f) The clothing should be carefully removed over a clean sheet or body pouch. Let the clothing dry if it is bloody or wet. Describe the clothing that is removed and label it in a permanent fashion. Either place the clothes in the custody of a responsible person or keep them, as they may be useful as evidence or for identification;

(g) The external examination, focusing on a search for external evidence of injury is, in most cases, the most important portion of the autopsy;

(i) Photograph all surfaces - 100 per cent of the body area. Take good quality, well-focused, colour photographs with adequate illumination;

(ii) Describe and document the means used to make the identification. Examine the body and record the deceased's apparent age, length, weight, sex, head hair style and length, nutritional status, muscular development and colour of skin, eyes and hair (head, facial and body);

(iii) In children, measure also the head circumference, crown-rump length and crown-heel length;

(iv) Record the degree, location and fixation of rigor and livor mortis;

(v) Note body warmth or coolness and state of preservation; note any decomposition changes, such as skin slippage. Evaluate the general condition of the body and note adipocere formation, maggots, eggs or anything else that suggests the time or place of death;

(vi) With all injuries, record the size, shape, pattern, location (related to obvious anatomic landmarks), colour, course, direction, depth and structure involved. Attempt to distinguish injuries resulting from therapeutic measures from those unrelated to medical treatment. In the description of projectile wounds, note the presence or absence of soot, gunpowder, or singeing. If gunshot residue is present, document it photographically and save it for analysis. Attempt to determine whether the gunshot wound is an entry or exit wound. If an entry wound is present and no exit wound is

seen, the projectile must be found and saved or accounted for. Excise wound tract tissue samples for microscopic examination. Tape together the edges of knife wounds to assess the blade size and characteristics;

(vii) Photograph all injuries, taking two colour pictures of each, labelled with the autopsy identification number on a scale that is oriented parallel or perpendicular to the injury. Shave hair where necessary to clarify an injury, and take photographs before and after shaving. Save all hair removed from the site of the injury. Take photographs before and after washing the site of any injury. Wash the body only after any blood or material that may have come from an assailant has been collected and saved;

(viii) Examine the skin. Note and photograph any scars, areas of keloid formation, tattoos, prominent moles, areas of increased or decreased pigmentation, and anything distinctive or unique such as birthmarks. Note any bruises and incise them for delineation of their extent. Excise them for microscopic examination. The head and genital area should be checked with special care. Note any injection sites or puncture wounds and excise them to use for toxicological evaluation. Note any abrasions and excise them; microscopic sections may be useful for attempting to date the time of injury. Note any bite marks; these should be photographed to record the dental pattern, swabbed for saliva testing (before the body is washed) and excised for microscopic examination. Bite marks should also be analysed by a forensic odontologist, if possible. Note any burn marks and attempt to determine the cause (burning rubber, a cigarette, electricity, a blowtorch, acid, hot oil etc.). Excise any suspicious areas for microscopic examination, as it may be possible to distinguish microscopically between burns caused by electricity and those caused by heat;

(ix) Identify and label any foreign object that is recovered, including its relation to specific injuries. Do not scratch the sides or tip of any projectiles. Photograph each projectile and large projectile fragment with an identifying label, and then place each in a sealed, padded and labelled container in order to maintain the chain of custody;

(x) Collect a blood specimen of at least 50 cc from a subclavian or femoral vessel;

(xi) Examine the head and external scalp, bearing in mind that injuries may be hidden by the hair. Shave hair where necessary. Check for fleas and lice, as these may indicate unsanitary conditions prior to death. Note any alopecia as this may be caused by malnutrition, heavy metals (e.g.

thallium), drugs or traction. Pull, do not cut, 20 representative head hairs and save them, as hair may also be useful for detecting some drugs and poisons;

(xii) Examine the teeth and note their condition. Record any that are absent, loose or damaged, and record all dental work (restorations, fillings etc.), using a dental identification system to identify each tooth. Check the gums for periodontal disease. Photograph dentures, if any, and save them if the decedent's identity is unknown. Remove the mandible and maxilla if necessary for identification. Check the inside of the mouth and note any evidence of trauma, injection sites, needle marks or biting of the lips, cheeks or tongue. Note any articles or substances in the mouth. In cases of suspected sexual assault, save oral fluid or get a swab for spermatozoa and acid phosphatase evaluation. (Swabs taken at the tooth-gum junction and samples from between the teeth provide the best specimens for identifying spermatozoa.) Also take swabs from the oral cavity for seminal fluid typing. Dry the swabs quickly with cool, blown air if possible, and preserve them in clean plain paper envelopes. If rigor mortis prevents an adequate examination, the masseter muscles may be cut to permit better exposure;

(xiii) Examine the face and note if it is cyanotic or if petechiae are present;

a. Examine the eyes and view the conjunctiva of both the globes and the eyelids. Note any petechiae in the upper or lower eyelids. Note any scleral icterus. Save contact lenses, if any are present. Collect at least 1 ml of vitreous humor from each eye;

b. Examine the nose and ears and note any evidence of trauma, haemorrhage or other abnormalities. Examine the tympanic membranes;

(xiv) Examine the neck externally on all aspects and note any contusions, abrasions or petechia. Describe and document injury patterns to differentiate manual, ligature and hanging strangulation. Examine the neck at the conclusion of the autopsy, when the blood has drained out of the area and the tissues are dry;

(xv) Examine all surfaces of the extremities: arms, forearms, wrists, hands, legs and feet, and note any "defence" wounds. Dissect and describe any injuries. Note any bruises about the wrists or ankles that may suggest restraints such as handcuffs or suspension. Examine the medial and lateral surfaces of the fingers, the anterior forearms and the backs of the knees for bruises;



(xvi) Note any broken or missing fingernails. Note any gunpowder residue on the hands, document photographically and save it for analysis. Take fingerprints in all cases. If the decedent's identity is unknown and fingerprints cannot be obtained, remove the "glove" of the skin, if present. Save the fingers if no other means of obtaining fingerprints is possible. Save finger nail clippings and any under-nail tissue (nail scrapings). Examine the fingernail and toenail beds for evidence of object having been pushed beneath the nails. Nails can be removed by dissecting the lateral margins and proximal base, and then the undersurface of the nails can be inspected. If this is done, the hands must be photographed before and after the nails are removed. Carefully examine the soles of the feet, noting any evidence of beating. Incise the soles to delineate the extent of any injuries. Examine the palms and knees, looking especially for glass shards or lacerations;

(xvii) Examine the external genitalia and note the presence of any foreign material or semen. Note the size, location and number of any abrasions or contusions. Note any injury to the inner thighs or peri-anal area. Look for peri-anal burns;

(xviii) In cases of suspected sexual assault, examine all potentially involved orifices. A speculum should be used to examine the vaginal walls. Collect foreign hair by combing the pubic hair. Pull and save at least 20 of the deceased's own pubic hairs, including roots. Aspirate fluid from the vagina and/or rectum, for acid phosphatase, blood group and spermatozoa evaluation. Take swabs from the same areas for seminal fluid typing. Dry the swabs quickly with cool, blown air if possible, and preserve them in clean plain paper envelopes;

(xix) The length of the back, the buttocks and extremities including wrists and ankles must be systematically incised to look for deep injuries. The shoulders, elbows, hips and knee joints must also be incised to look for ligamentous injury;

(h) The internal examination for internal evidence of injury should clarify and augment the external examination;

(i) Be systematic in the internal examination. Perform the examination either by body regions or by systems, including the cardiovascular, respiratory, biliary, gastrointestinal, reticuloendothelial, genitourinary, endocrine, musculoskeletal, and central nervous systems. Record the weight, size, shape, colour and consistency of each organ, and note any neoplasia, inflammation, anomalies,

haemorrhage, ischemia, infarcts, surgical procedures or injuries. Take sections of normal and any abnormal areas of each organ for microscopic examination. Take samples of any fractured bones for radiographic and microscopic estimation of the age of the fracture;

(ii) Examine the chest. Note any abnormalities of the breasts. Record any rib fractures, noting whether cardiopulmonary resuscitation was attempted. Before opening, check for pneumothoraces. Record the thickness of subcutaneous fat. Immediately after opening the chest, evaluate the pleural cavities and the pericardial sac for the presence of blood or other fluid, and describe and quantify any fluid present. Save any fluid present until foreign objects are accounted for. Note the presence of air embolism, characterized by frothy blood within the right atrium and right ventricle. Trace any injuries before removing the organs. If blood is not available at other sites, collect a sample directly from the heart. Examine the heart, noting degree and location of coronary artery disease or other abnormalities. Examine the lungs, noting any abnormalities;

(iii) Examine the abdomen and record the amount of subcutaneous fat. Retain 50 grams of adipose tissue for toxicological evaluation. Note the interrelationships of the organs. Trace any injuries before removing the organs. Note any fluid or blood present in the peritoneal cavity, and save it until foreign objects are accounted for. Save all urine and bile for toxicologic examination;

(iv) Remove, examine and record the quantitative information on the liver, spleen, pancreas, kidneys and adrenal glands. Save at least 150 grams each of kidney and liver for toxicological evaluation. Remove the gastrointestinal tract and examine the contents. Note any food present and its degree of digestion. Save the contents of the stomach. If a more detailed toxicological evaluation is desired, the contents of other regions of the gastrointestinal tract may be saved. Examine the rectum and anus for burns, lacerations or other injuries. Locate and retain any foreign bodies present. Examine the aorta, inferior vena cava and iliac vessels;

(v) Examine the organs in the pelvis, including ovaries, fallopian tubes, uterus, vagina, testes, prostate gland, seminal vesicles, urethra and urinary bladder. Trace any injuries before removing the organs. Remove these organs carefully so as not to injure them artifactually. Note any evidence of previous or current pregnancy, miscarriage or delivery. Save any

foreign objects within the cervix, uterus, vagina, urethra or rectum;

(vi) Palpate the head and examine the external and internal surfaces of the scalp, noting any trauma or haemorrhage. Note any skull fractures. Remove the calvarium carefully and note epidural and subdural haematomas. Quantify, date and save any haematomas that are present. Remove the dura to examine the internal surface of the skull for fractures. Remove the brain and note any abnormalities. Dissect and describe any injuries. Cerebral cortical atrophy, whether focal or generalized, should be specifically commented upon;

(vii) Evaluate the cerebral vessels. Save at least 150 grams of cerebral tissue for toxicological evaluation. Submerge the brain in fixative prior to examination, if this is indicated;

(viii) Examine the neck after the heart and brain have been removed and the neck vessels have been drained. Remove the neck organs, taking care not to fracture the hyoid bone. Dissect and describe any injuries. Check the mucosa of the larynx, pyriform sinuses and esophagus, and note any petechiae, edema or burns caused by corrosive substances. Note any articles or substances within the lumina of these structures. Examine the thyroid gland. Separate and examine the parathyroid glands, they are readily identifiable;

(ix) Dissect the neck muscles, noting any haemorrhage. Remove all organs, including the tongue. Dissect the muscles from the bones and note any fractures of the hyoid bone or thyroid or cricoid cartilages;

(x) Examine the cervical, thoracic and lumbar spine. Examine the vertebrae from their anterior aspects and note any fractures, dislocations, compressions or haemorrhages. Examine the vertebral bodies. Cerebrospinal fluid may be obtained if additional toxicological evaluation is indicated;

(xi) In cases in which spinal injury is suspected, dissect and describe the spinal cord. Examine the cervical spine anteriorly and note any haemorrhage in the paravertebral muscles. The posterior approach is best for evaluating high cervical injuries. Open the spinal canal and remove the spinal cord. Make transverse sections every 0.5 cm and note any abnormalities;

(i) After the autopsy has been completed, record which specimens have been saved. Label all specimens with the name of the deceased, the autopsy identification number, the date and time of collection, the name of the prosecutor and the contents. Carefully preserve all evidence and record the chain of custody with appropriate release forms;

(i) Perform appropriate toxicologic tests and retain portions of the tested samples to permit retesting;

a. Tissues: 150 grams of liver and kidney should be saved routinely. Brain, hair and adipose tissue may be saved for additional studies in cases where drugs, poisons or other toxic substances are suspected;

b. Fluids: 50 cc (if possible) of blood (spin and save serum in all or some of the tubes), all available urine, vitreous humor and stomach contents should be saved routinely. Bile, regional gastrointestinal tract contents and cerebrospinal fluid should be saved in cases where drugs, poisons or toxic substances are suspected. Oral, vaginal and rectal fluid should be saved in cases of suspected sexual assault;

(ii) Representative samples of all major organs, including areas of normal and any abnormal tissue, should be processed histologically and stained with hematoxylin and eosin (and other stains as indicated). The slides, wet tissue and paraffin blocks should be kept indefinitely;

(iii) Evidence that must be saved includes:

a. All foreign objects, including projectiles, projectile fragments, pellets, knives and fibres. Projectiles must be subjected to ballistic analysis;

b. All clothes and personal effects of the deceased, worn by or in the possession of the deceased at the time of death;

c. Fingernails and under nail scrapings;

d. Hair, foreign and pubic, in cases of suspected sexual assault;

e. Head hair, in cases where the place of death or location of the body prior to its discovery may be an issue;

(j) After the autopsy, all unretained organs should be replaced in the body, and the body should be well embalmed to facilitate a second autopsy in case one is desired at some future point;

(k) The written autopsy report should address those items that are emphasized in boldface type in the protocol. At the end of the autopsy report should be a summary of the findings and the cause of death. This should include the prosecutor's comments attributing any injuries to external trauma, therapeutic efforts, postmortem change, or other causes. A full report should be given to the appropriate authorities and to the deceased's family.<sup>253</sup>

253 UN Doc E/ST/CSDHA/12 (1991), United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and

## 8. Searches of Detained Persons

The custody officer at a police station shall ascertain 'everything which a person has with him or her' when he or she is: a) brought to the station after being arrested elsewhere or after being committed to custody by an order of sentence of a court, or b) arrested at the station or detained there.<sup>254</sup> The custody officer may make a record of these details.<sup>255</sup> The custody officer has the power to seize and retain clothes and personal effects if he or she:

a) believes that the person from whom they are seized may use them –

- i) to cause physical injury to himself or herself or any other person;
- ii) to damage property;
- iii) to interfere with evidence;
- iv) to assist him to escape; or

b) has reasonable grounds for believing that they may be evidence relating to an offence.<sup>256</sup>

The person from whom it is seized shall be told the reason for the seizure unless he or she is violent or likely to become violent, or incapable of understanding what is being said.<sup>257</sup> A person who is in custody at a police station or is in police detention otherwise than at a police station 'may at any time be searched in order to ascertain whether he or she has anything which he or she could use for any purpose' of the above.<sup>258</sup> Anything found during the search can be seized and retained if related to the above circumstances.<sup>259</sup> The officer carrying out a search 'shall be of the same sex as the person searched'.<sup>260</sup>

### Searches and Examination to Ascertain Identity

On authorisation from a superior officer, a person who is detained in a police station may be searched and/or examined for the purpose of:

- a) ascertaining whether he or she has a mark that would tend to identify him as a person involved in the commission of an offence; or
- b) facilitating the ascertainment of his or her identity.<sup>261</sup>

This is required what the person has refused to identify himself or herself, or the officer has reasonable grounds

for suspecting that the person is not who he or she claims to be.<sup>262</sup>

Authorisation may only be given for the purpose of:

- a) the appropriate consent to a search or examination that would reveal whether the mark in question exists has been withheld; or
- b) it is not practicable to obtain such consent.<sup>263</sup>

A photograph may be taken with consent, unless this is withheld or is not practicable.<sup>264</sup> The photograph may be used or disclosed to 'any person for any purpose related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution'.<sup>265</sup>

The search and, if applicable, photography must be facilitated by an officer of the same sex.<sup>266</sup>

### Searches of Persons Answering to Live Link Bail

An officer may search at any time: a) any person who is at a police station to answer to live link bail; and b) any article in the possession of such a person.<sup>267</sup> The officer may seize and retain a thing in the possession of the person ought to be if he or she 'reasonable believes' that the thing:

- a) may jeopardise the maintenance of order in the police station;
- b) may put the safety of any person in the police station at risk; or
- c) may be evidence of, or in relation to, an offence.<sup>268</sup>

A record of the items seized or retained may be made.<sup>269</sup>

### Power to Retain Articles Seized

An officer may retain a thing seized from a detained person:

- a) until the time when the person from whom it was seized leaves the police station;<sup>270</sup>
- b) in order to establish its lawful owner, where there are reasonable grounds for believing that it has been obtained in consequence of the commission of an offence;<sup>271</sup>

Summary Executions 1991, Minnesota Protocol, para B.2.

254 Section 54(1), Police and Criminal Evidence Act 1984.

255 Section 54(2), Police and Criminal Evidence Act 1984.

256 Section 54(4), Police and Criminal Evidence Act 1984.

257 Section 54(5), Police and Criminal Evidence Act 1984.

258 Sections 54(6) and 54(6)(A), Police and Criminal Evidence Act 1984.

259 Sections 54(6)(B) and 54(6)(C), Police and Criminal Evidence Act 1984.

260 Section 54(9), Police and Criminal Evidence Act 1984.

261 Section 54A(1), Police and Criminal Evidence Act 1984.

262 Section 54A(3), Police and Criminal Evidence Act 1984.

263 Section 54A(2), Police and Criminal Evidence Act 1984.

264 Section 54A(5), Police and Criminal Evidence Act 1984.

265 Section 54A(9)(a), Police and Criminal Evidence Act 1984.

266 Section 54A(7), Police and Criminal Evidence Act 1984.

267 Section 54B(1), Police and Criminal Evidence Act 1984.

268 Sections 54B(2) and 54B(3), Police and Criminal Evidence Act 1984.

269 Section 54B(4), Police and Criminal Evidence Act 1984.

270 Section 54C(1), Police and Criminal Evidence Act 1984.

271 Section 54C(2), Police and Criminal Evidence Act 1984.

- c) for use as evidence at a trial for an offence;<sup>272</sup>
- d) for forensic examination or for investigation in connection with an offence.<sup>273</sup>

Nothing may be retained 'if a photograph or copy would be sufficient'.<sup>274</sup>

### Intimate Searches

A superior officer may order an intimate search if he or she has reasonable grounds for believing that a person who has been arrested and is in police detention:

- a) may have concealed on him or her anything that could be used to cause physical injury to himself, herself or others;<sup>275</sup> or
- b) may have a Class A drug concealed on him or her and was in possession of it with the appropriate criminal intent before his or her arrest.<sup>276</sup>

An intimate search is only to be conducted if there is 'reasonable grounds for believing that [the thing] cannot be found' otherwise.<sup>277</sup> The search must be conducted a qualified person of the same sex.<sup>278</sup> The search can only take place at a police station, a hospital, a registered medical practitioner's surgery or some other place used for medical purposes.<sup>279</sup>

The custody officer at a police station may seize and retain anything which is found on an intimate search:

- a) if he or she believes that the person whom is seized from may use it –
  - i) to cause physical injury to himself or herself or any other person;
  - ii) to damage property;
  - iii) to interfere with evidence;
  - iv) to assist him to escape; or
- b) if he or she has reasonable grounds for believing that it may be evidence relating to an offence.<sup>280</sup>

The person from whom it is seized 'shall be told the reason for the seizure' unless he or she is violent, or likely to become violent, or incapable of understanding what is being said.<sup>281</sup>

A written record of the search should be made stating

272 Section 54C(3)(a), Police and Criminal Evidence Act 1984.  
 273 Section 54C(3)(b), Police and Criminal Evidence Act 1984.  
 274 Section 54C(4), Police and Criminal Evidence Act 1984.  
 275 Section 55(1)(a), Police and Criminal Evidence Act 1984.  
 276 Section 55(1)(b), Police and Criminal Evidence Act 1984.  
 277 Section 55(2), Police and Criminal Evidence Act 1984.  
 278 Section 55(7), Police and Criminal Evidence Act 1984.  
 279 Section 55(8), Police and Criminal Evidence Act 1984.  
 280 Section 55(12), Police and Criminal Evidence Act 1984.  
 281 Section 55(13), Police and Criminal Evidence Act 1984.

which parts of the body were searched, why, how many searches and the result of the searches.<sup>282</sup> This shall be done as soon as practicable after the completion of the search.<sup>283</sup>

### X-Rays and Ultrasounds

An x-ray and/or ultrasound may be carried out on a person who has been arrested for an offence and is in police detention if an officer has 'reasonable grounds for believing' that the person has swallowed a Class A drug and was in possession of it with the appropriate criminal intent before his or her arrest.<sup>284</sup> The appropriate consent must be given in writing.<sup>285</sup> If consent is 'refused without good cause' a judge may draw inferences from the refusal'.<sup>286</sup>

The person who is to be subject to the test must be informed that authorisation has been given and the grounds for the test.<sup>287</sup> The x-ray or ultrasound can only be carried out by 'a suitably qualified person' and only at 'a hospital, a registered medical practitioner's surgery or some other place used for medical purposes'.<sup>288</sup>

The tests must be recorded in the custody record.<sup>289</sup> This must state where the authorisation came from, the grounds for giving the authorisation, that the appropriate consent was given, the number of tests and the results.<sup>290</sup> This information 'must be recorded as soon as practicable after the x-ray has been taken or ultrasound scan carried out'.<sup>291</sup> An annual report must also be issued on the use of these tests.<sup>292</sup>

### Suspect's Rights

#### Right to Have Someone Informed When Arrested

A person who has been arrested and is being held in custody in a police station or other premises 'shall be entitled, if he or she so requests, to have one friend or relative or other person who is known to him or her or who is likely to take an interest in his or her welfare told' that he or she has been arrested.<sup>293</sup> This shall be done 'as soon as practicable'<sup>294</sup> and within a

282 Sections 55(10) and 55(15), Police and Criminal Evidence Act 1984.

283 Section 55(11), Police and Criminal Evidence Act 1984.

284 Section 55A(1), Police and Criminal Evidence Act 1984.

285 Section 55A(2), Police and Criminal Evidence Act 1984.

286 Section 55A(9), Police and Criminal Evidence Act 1984.

287 Section 55A(3), Police and Criminal Evidence Act 1984.

288 Section 55A(4), Police and Criminal Evidence Act 1984.

289 Sections 55A(5), Police and Criminal Evidence Act 1984.

290 Sections 55A(5) and 55A(8), Police and Criminal Evidence Act 1984.

291 Section 55A(6), Police and Criminal Evidence Act 1984.

292 Section 55A(7), Police and Criminal Evidence Act 1984.

293 Section 56, Police and Criminal Evidence Act 1984.

294 Section 56(1), Police and Criminal Evidence Act 1984.

maximum of 36 hours of arrest or detention.<sup>295</sup> This right is exercisable whenever the person detained is transferred from one place to another.<sup>296</sup>

Delays are only permitted in the case of a person who is in police detention for an indictable offence and if an officer of sufficient ranking authorises it.<sup>297</sup> The authorisation must be confirmed in writing.<sup>298</sup> The officer can grant authorisation if he or she 'reasonably believes' that the person being detained for the indictable offence has benefited from his or her criminal conduct, and the recovery of the value of the property constitution the benefit will be hindered by telling the named person of the arrest.<sup>299</sup> No further delay is permitted 'once the reason for authorising delay ceases to subsist'.<sup>300</sup> If a delay is authorised the detained person must be told the reason for it and the reason shall be noted in the custody record.<sup>301</sup>

### Additional Rights of Children and Young Persons

If a child or young person is in police detention, 'such steps as are practicable shall be taken to ascertain the identity of a person responsible for his or her welfare'.<sup>302</sup> That person shall be informed, unless it is not practicable to do so, that the child or young person has been arrested, why he or she has been arrested, and where he or she is detained.<sup>303</sup> This information 'shall be given as soon as is practicable to do so'.<sup>304</sup>

### Access to Legal Advice

A person arrested and held in custody in a police station or other premises 'shall be entitled, if he or she so requests, to consult a solicitor privately at any time'.<sup>305</sup> If a request is made, he or she 'must be permitted to consult a solicitor as soon as is practicable'<sup>306</sup> and within a maximum of 36 hours of arrest or detention.<sup>307</sup> Delays are only permitted in the case of a person who is in police detention for an indictable offence and if an officer of sufficient ranking authorises it.<sup>308</sup> The authorisation must be confirmed in writing.<sup>309</sup> The officer can grant authorisation if he or she 'reasonably believes' that:

a) the person being detained desires to exercise this right in order to lead to interference with or harm to evidence connected with an indictable offence or interference with or physical injury to other persons;<sup>310</sup>

b) the person being detained desires to exercise this right in order to lead to the alerting of other persons suspected of having committed such an offence but not yet arrested for it;<sup>311</sup>

c) the person being detained desires to exercise this right in order to hinder the recovery of any property obtained as a result of such an offence;<sup>312</sup>

d) the person being detained for the indictable offence has benefited from his or her criminal conduct;<sup>313</sup> or

e) the recovery of the value of the property constitution the benefit will be hindered by telling the named person of the arrest.<sup>314</sup>

No further delay is permitted 'once the reason for authorising delay ceases to subsist'.<sup>315</sup> If a delay is authorised the detained person must be told the reason for it and the reason shall be noted in the custody record.<sup>316</sup>

### Tape Recordings of Interviews

Recording of interviews will be done 'fairly, responsibly, with respect for the people to whom they apply and without unlawful discrimination'.<sup>317</sup> The recordings will be conducted in a way that respects the 'need to eliminate unlawful discrimination, harassment and victimisation'.<sup>318</sup> The recordings will be 'carried out openly to instil confidence in its reliability as an impartial and accurate record of the interview'.<sup>319</sup> Interviews can be recorded on any removable, physical audio recording medium (such as magnetic tape, optical disc or solid state memory) which can be played

295 Section 56(3), Police and Criminal Evidence Act 1984.

296 Section 56(8), Police and Criminal Evidence Act 1984.

297 Section 56(2), Police and Criminal Evidence Act 1984.

298 Section 456(4), Police and Criminal Evidence Act 1984.

299 Section 56(6), Police and Criminal Evidence Act 1984.

300 Section 56(9), Police and Criminal Evidence Act 1984.

301 Section 56(5), Police and Criminal Evidence Act 1984.

302 Section 57(2), Police and Criminal Evidence Act 1984.

303 Section 57(3), Police and Criminal Evidence Act 1984.

304 Section 57(4), Police and Criminal Evidence Act 1984.

305 Section 58(1), Police and Criminal Evidence Act 1984.

306 Section 58(2), Police and Criminal Evidence Act 1984.

307 Section 58(5), Police and Criminal Evidence Act 1984.

308 Section 58(6), Police and Criminal Evidence Act 1984.

309 Section 58(7), Police and Criminal Evidence Act 1984.

310 Section 58(8)(a), Police and Criminal Evidence Act 1984.

311 Section 58(8)(b), Police and Criminal Evidence Act 1984.

312 Section 58(8)(c), Police and Criminal Evidence Act 1984.

313 Section 58(8A)(a), Police and Criminal Evidence Act 1984.

314 Section 58(8A)(b), Police and Criminal Evidence Act 1984.

315 Section 58(11), Police and Criminal Evidence Act 1984.

316 Section 58(9), Police and Criminal Evidence Act 1984.

317 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 1.0.

318 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 1.0.

319 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 1.5A.



and copied.<sup>320</sup> They should be stored on an accredited secure computer network system as a digital multi-media file or a series of such files.<sup>321</sup>

A detainee is viewed as not fit to be interviewed if conducting the interview could 'significantly harm the detainee's physical or mental state' or if anything that is said in the interview 'might be considered unreliable in subsequent court proceedings because of their physical or mental state'.<sup>322</sup> In such cases a health care profession should be consulted.<sup>323</sup>

## Recording and Sealing Master Recordings

One recording, the master recording, will be sealed in the suspect's presence. This is to establish the interviewee's confidence that the integrity of the recording is preserved.<sup>324</sup> The master copy is any of the recordings made by a multi-deck/drive machine or the only recording made by such a machine. A second recording will be used as a working copy.<sup>325</sup>

The identity of the officer conducting the interviews does not have to be recorded or disclosed if the interviewer reasonably believes that recording or disclosing their name might put them in danger.<sup>326</sup> In such instances the warrant or other identification number should be used. The reasons for this should be recorded in the custody record or pocket book.<sup>327</sup>

## Interviews to be Audio Recorded

Audio recording shall be used for any interview:

- a) with a person cautioned in respect of an indictable offence;
- b) which takes place as a result of an interviewer exceptionally putting further questions to a suspect

320 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 1.6(aa).

321 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 1.6(c).

322 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), Annex G, para 2.

323 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), Annex G, paras 3-8.

324 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 2A.

325 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 2.2.

326 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 2.3.

327 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 2.3.

about an indictable offence; or

- c) when an interviewer wants to tell a person, after they have been charged with, or informed they may be prosecuted for, an indictable offence about any written statement or interview with another person.<sup>328</sup>

The whole interview shall be recorded, including the taking and reading back of any statement.<sup>329</sup> A sign or indicator which is visible to the suspect must show when the recording equipment is recording.<sup>330</sup>

Interviews do not have to be audio recorded if it is not reasonably practicable and there are no reasonable grounds to delay the audio recording or to continue to audio record due to equipment failure, the unavailability of a suitable interview room or recording equipment, or the interviewee's refusal to go into or remain in a suitable interview room.<sup>331</sup> In such instances the interview shall be recorded in writing.<sup>332</sup>

## Commencement of Interview

The interviewer will, without delay and in sight of the suspect, load the recorder with new recording media and set it to record. The recording media must be unwrapped and opened in the suspect's presence.<sup>333</sup> The interviewer will point out the sign or indicator which shows the recording equipment is activated and recording. The interviewer shall:

- a) explain that the interview is being audibly recorded;
- b) give the name and rank and that of any other interviewer present, unless it is inappropriate to do so, in which case the interviewer will give the warrant or other identification number;
- c) ask the suspect and any other party present to identify themselves;
- d) state the date, time of commencement and place of the interview; and
- e) state the suspect will be given notice about what

328 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 3.1.

329 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 3.5.

330 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 3.6.

331 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), paras 3.3, 3.3A and 3.4.

332 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 3.3A.

333 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 4.3.

will happen to the recording.<sup>334</sup>

The interviewer shall caution the suspect, clarify whether they are under arrest, and remind the interviewee of their entitlement to free legal advice.<sup>335</sup> The interviewer shall put to the suspect any significant statement or silence.<sup>336</sup>

Any person that enters the interview room after the interview has commenced shall be invited to identify themselves for the purpose of the audio recording and state the reason why they have entered the interview room.<sup>337</sup>

### Interviews with Interpreters

The interview should be conducted in the presence of the relevant interpreter for those who have difficulties in understanding due to language or hearing difficulties.<sup>338</sup> The interview should not be conducted in the absence of an interpreter.<sup>339</sup> If the suspect appears to have difficulties in understanding, the interviewer will make a written note of the interview and an audio recording.<sup>340</sup>

Written translations of essential documents must also be given.<sup>341</sup>

### Objections by the Suspect

If the suspect or an appropriate adult object to the interview being audibly recorded at any point before or during the interview, the interviewer will explain why it is being audibly recorded.<sup>342</sup> The interviewee is required to audibly record their objections, if they refuse to do so, it is up to the interviewer.<sup>343</sup> The audio recording can then be

turned off and the interview recorded in writing. However, if the interviewer reasonably considers that they may proceed with the audio recording, they may do so.<sup>344</sup>

If the suspect indicated they want to tell the interviewer about matters not directly connected with the offence of which they are suspected and they are unwilling for these matters to be audio recorded, the suspect should be given the opportunity to tell the interviewer about these matters after the conclusion of the formal interview.<sup>345</sup>

### Changing Recording Media

When the recorder shows the recording media only has a short time left to run, the interviewer shall inform the interviewee and round off that part of the interview. The suspect shall not be left unattended. The interviewer will remove the recording media from the recorder and insert the new recording media which shall be unwrapped or opened in the suspect's presence. The recorder should be set to record on the new media. To avoid confusion between the recording media, the interviewer shall mark the media with an identification number immediately after it is removed from the recorder.<sup>346</sup> The recording shall be retained.<sup>347</sup>

### Taking a Break during Interview

When a break is taken, the fact that a break is to be taken, the reason for it and the time shall be recorded on the audio recording.<sup>348</sup> When a break is taken and the interview room is vacated by the suspect, the recording media shall be removed from the recorder and the procedures for the conclusion of an interview followed.<sup>349</sup> If the break is only a short one and both the suspect and an interviewer remain in the interview room, the recording may simply be stopped.<sup>350</sup> When the interview recommences the recording should continue on the same recording media with the time

334 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 4.4.

335 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 4.5.

336 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 4.6.

337 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 4.4A.

338 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), paras 13.2 and 13.5.

339 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 13.2.

340 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), paras 13.3 and 13.5.

341 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 13.10B.

342 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 4.8.

343 UK Home Office, 'Code E Revised – Code of Practice on Audio

Recording Interviews with Suspects' (The Stationery Office, 2013), para 4.8.

344 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 4.8.

345 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 4.10.

346 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 4.11.

347 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 4.16.

348 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 4.12.

349 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 4.12A.

350 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 4.13.



of recommencement recorded.<sup>351</sup> The interviewee should also be reminded of their right to legal advice, if they have not exercised it and that they remain under caution.<sup>352</sup> If there is any doubt, the caution should be given in full again.<sup>353</sup>

### Failure of Recording Equipment

If the equipment failure can be rectified quickly, the interviewer shall follow the appropriate procedures – e.g. insert new recording media.<sup>354</sup> When the recording is resumed the interviewer shall explain what happened and record the time the interview recommences.<sup>355</sup> If it is not possible to rectify the problem quickly the interview will continue and be recorded in writing.<sup>356</sup>

### Conclusion of Interview

At conclusion of the interview, the suspect shall be offered the opportunity to clarify anything they have said and asked if there is anything they want to add.<sup>357</sup> The time of conclusion shall be recorded and the recording shall be stopped.<sup>358</sup> The interviewer shall seal the master recording with a master recording label and treat it as an exhibit.<sup>359</sup> The interviewer shall sign the label and ask the suspect and any third party present during the interview to sign it. If the suspect or third party refuses to sign the label an officer of the appropriate ranking shall be called into the interview room and asked to sign it.<sup>360</sup> The suspect shall be handed notice that sets out how the audio recording will be used, the arrangements of access to it, and that a copy will be provided as soon

as practicable if the interviewee is charged or informed that they will be prosecuted.<sup>361</sup>

### After the Interview

The interviewer shall make a note in their pocket book that the interview took place, that it was audio recorded, the time it commenced, its duration, the date and identification number of the master copy.<sup>362</sup> The recording must be kept secure if no proceedings follow in respect of the interviewee.<sup>363</sup>

### Master Recording Security

The officer in charge shall make arrangements for master recordings to be kept securely and their movements accounted for.<sup>364</sup>

The Crown Prosecution Service must be present for the breaking of a master recording seal. The defendant and their lawyer should also be given the opportunity to be present and to sign the label after it is resealed. If they refuse to sign, the Crown Prosecution Service representative can sign.<sup>365</sup> If the seal is being broken where no criminal proceedings result or the criminal proceedings have been concluded, it is an officer of sufficient ranking's responsibility to ensure that all the reasonably necessary measures are taken.<sup>366</sup> Either the interviewee or an independent person should be present when the master seal is broken and resealed.<sup>367</sup> A record must be made when the master seal is broken documenting the date, time, place and persons present.<sup>368</sup>

351 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 4.13.

352 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 4.13.

353 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 4.14.

354 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 4.15.

355 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 4.15.

356 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 4.15.

357 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 4.17.

358 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 4.18.

359 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 4.18.

360 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 4.18.

361 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 4.19.

362 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 5.1.

363 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 5.2.

364 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 6.1.

365 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 6.2.

366 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 6.3.

367 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 6.3B.

368 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 6.4.

## Recording of Interviews by Secure Digital Network

The same procedure should be followed for the recording of interviews by secure digital network as set out above for the recording of interviews using recording media.<sup>369</sup>

Interview record files of a Secure Digital Network should be stored in a read only format on non-removable storage devices to ensure their integrity.<sup>370</sup> The recordings are first saved locally to a secure non-removable device before being transferred to the remote network device.<sup>371</sup> If for any reason the network connection fails, the recording remains on the local device and will be transferred when the network connections are restored.<sup>372</sup>

Access should be strictly controlled and monitored. Only those who have specific permission shall have access.<sup>373</sup>

## Video Recordings of Interviews

The same process should be followed for video recordings of interviews, as with audio recordings of interviews.<sup>374</sup>

The camera shall be placed in the interview room so as to ensure coverage of as much of the room as is practicably possible whilst the interviews are taking place.<sup>375</sup> When the recording medium is placed in the recorder and it is switched on to record, the correct date and time, in hours, minutes and seconds, will be superimposed automatically second by second, during the whole recording.<sup>376</sup>

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369 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), paras 7.1-7.15.

370 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 7.16.

371 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 7.16.

372 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 7.16.

373 UK Home Office, 'Code E Revised – Code of Practice on Audio Recording Interviews with Suspects' (The Stationery Office, 2013), para 7.17.

374 UK Home Office, 'Code F Revised – Code of Practice on Visual Recording with Sound of Interviews with Suspects' (The Stationery Office, 2013), paras 1-7.4.

375 UK Home Office, 'Code F Revised – Code of Practice on Visual Recording with Sound of Interviews with Suspects' (The Stationery Office, 2013), para 2.2.

376 UK Home Office, 'Code F Revised – Code of Practice on Visual Recording with Sound of Interviews with Suspects' (The Stationery Office, 2013), para 2.3.

## Fingerprinting

Appropriate consent must be given in writing before a detained person's fingerprints can be taken.<sup>377</sup> Fingerprints may be taken of a detained person at a police station without the appropriate consent if:

- a) he or she is detained in consequence of his or her arrest for a recordable offence;<sup>378</sup>
- b) he or she has not had his or her fingerprints taken in the course of the investigation of the offence by the police;<sup>379</sup>
- c) the person has answered to bail at a court or police station and it is ordered by a court or police officer of sufficient ranking.<sup>380</sup>

If a detained person has already had his or her fingerprints taken in the course of the investigation of the offence by the police, another set of fingerprints can be taken if:

- a) the fingerprints taken on the previous occasion do not constitute a complete set of his or her fingerprints; or
- b) some or all of the fingerprints taken on the previous occasion are not of sufficient quality to allow satisfactory analysis, comparison or matching (whether in the case in question or generally).<sup>381</sup>

A court or police officer may only authorise fingerprints to be taken if:

- a) the person who has answered to bail has answered to it for a person whose fingerprints were taken on a previous occasion and there are reasonable grounds for believing that he or she is not the same person; or
- b) the person who has answered to bail claims to be a different person from a person whose fingerprints were taken on a previous occasion.<sup>382</sup>

If fingerprints are taken without consent the authorisation must be confirmed in writing 'as soon as practicable'.<sup>383</sup> The person must also be informed of the reason for taking fingerprints, informed that it will be recorded and warned that he or she may be subject to a speculative search.<sup>384</sup>

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377 Sections 61(1) and 61(2), Police and Criminal Evidence Act 1984.

378 Section 61(3), Police and Criminal Evidence Act 1984.

379 Section 61(3), Police and Criminal Evidence Act 1984.

380 Section 61(4A), Police and Criminal Evidence Act 1984.

381 Section 61(3A), Police and Criminal Evidence Act 1984.

382 Section 61(4B), Police and Criminal Evidence Act 1984.

383 Section 61(5), Police and Criminal Evidence Act 1984.

384 Sections 61(7) and 61(7A), Police and Criminal Evidence Act

These fingerprints may be checked against:

a) other samples to which the person seeking to check has access and which are held by or on behalf of anyone or more relevant law enforcement authorities or which are held in connection with or as a result of an investigation of an offence; or

b) information derived from other samples if the information is contained in records to which the person seeking to check has access.<sup>385</sup>

### Impressions of Footwear

Appropriate consent must be given in writing before an impression of a person's footwear may be taken.<sup>386</sup> Impressions of footwear may be taken of a detained person at a police station without the appropriate consent if:

a) he or she is detained in consequence of his or her arrest for a recordable offence;<sup>387</sup>

b) he or she has not had an impression of his or her footwear taken in the course of the investigation of the offence by the police;<sup>388</sup>

If a detained person has already had an impression of his or her footwear taken in the course of the investigation of the offence by the police, another set of impressions can be taken if the previous impressions were incomplete or of insufficient quality.<sup>389</sup>

Impressions of footwear without consent can be authorised by a police officer with sufficient authority.<sup>390</sup> If impressions of footwear are taken without consent the authorisation must be confirmed in writing 'as soon as practicable'.<sup>391</sup> The person must also be informed of the reason for taking the impressions and informed that it will be recorded and warned that he or she may be subject to a speculative search.<sup>392</sup>

These impressions may be checked against:

a) other samples to which the person seeking to check has access and which are held by or on behalf of anyone or more relevant law enforcement authorities or which are held in connection with or as a result of an investigation of an offence; or

b) information derived from other samples if the information is contained in records to which the person seeking to check has access.<sup>393</sup>

### Intimate Sample

An intimate search 'consists of the physical examination of a person's body orifices other than the mouth.' It is highlighted that 'the intrusive nature of such searches means the actual and potential risks associated with intimate searches must never be underestimated'.<sup>394</sup>

An intimate sample may be taken from a person in police detention only if a police officer with the appropriate ranking authorises it to be taken and if the appropriate consent is given.<sup>395</sup> Authorisation will only be given if the police officer has 'reasonable grounds' for suspecting the involvement of the person from whom the sample is to be taken in a recordable offence and that the sample will confirm or disprove his or her involvement.<sup>396</sup> The appropriate consent must be given in writing<sup>397</sup> and the authorisation must be confirmed in writing 'as soon as practicable'.<sup>398</sup> This includes stating the source of authorisation, the grounds for authorisation and whether consent was given. The person subject to the test will be informed that he or she may be the subject of a speculative search and that the test will be recorded.<sup>399</sup> If the appropriate consent is refused 'without good cause' the court may draw inferences from the refusal.<sup>400</sup> The person must be warned that this will be case and reminded that they are entitled to free legal advice.<sup>401</sup>

The intimate sample must be taken by a relevant professional and a minimum of two people, other than the detainee, must be present.<sup>402</sup> A dental impression must be taken by a registered dentist and any other form, except in the case of urine sample, must be taken by a registered medical practitioner or registered health care professional.<sup>403</sup> If it is impracticable for a medical practitioner to take the sample, a police officer may do it,

393 Section 63A(1), Police and Criminal Evidence Act 1984.

394 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationary Office, 2014), Annex A, para 1.

395 Section 62(1), Police and Criminal Evidence Act 1984.

396 Section 62(2), Police and Criminal Evidence Act 1984.

397 Section 62(4), Police and Criminal Evidence Act 1984.

398 Section 62(3), Police and Criminal Evidence Act 1984.

399 Section 62(7A), Police and Criminal Evidence Act 1984.

400 Section 62(10), Police and Criminal Evidence Act 1984.

401 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationary Office, 2014), Annex A, para 2B.

402 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationary Office, 2014), Annex A, para 6.

403 Sections 62(9) and 62(9A), Police and Criminal Evidence Act 1984.

1984.

385 Section 63A(1), Police and Criminal Evidence Act 1984.

386 Sections 61A(1) and 61A(2), Police and Criminal Evidence Act 1984.

387 Section 61A(3)(a), Police and Criminal Evidence Act 1984.

388 Section 61A(3)(b), Police and Criminal Evidence Act 1984.

389 Section 61A(4), Police and Criminal Evidence Act 1984.

390 Section 61A(7), Police and Criminal Evidence Act 1984.

391 Section 61A(6)(b), Police and Criminal Evidence Act 1984.

392 Sections 61A(5) and 61A(6), Police and Criminal Evidence Act 1984.

but this must be recorded.<sup>404</sup> If the person being searched is a juvenile or mentally vulnerable the search must take place in the presence of an appropriate adult of the same sex, unless the detainee specifically requests a particular adult of the opposite sex who is readily available.<sup>405</sup> A juvenile can request that the required adult is not present, but the relevant adult must agree.<sup>406</sup>

An intimate sample may be taken from a person who is not in police detention but from whom, in the course of the investigation of the offence, two or more non-intimate samples suitable for the same means of analysis have been taken which have 'proved insufficient'.<sup>407</sup> The same requirements for authorisation and consent apply.<sup>408</sup>

These samples may be checked against:

- a) other samples to which the person seeking to check has access and which are held by or on behalf of anyone or more relevant law enforcement authorities or which are held in connection with or as a result of an investigation of an offence; or
- b) information derived from other samples if the information is contained in records to which the person seeking to check has access.<sup>409</sup>

### Other Non-Intimate Samples

The appropriate consent is required to take a non-intimate sample from a person.<sup>410</sup> This consent must be in writing.<sup>411</sup> A non-intimate sample may be taken without consent if:

- a) the person is in police detention in consequence of his or her arrest for a recordable offence;
- b) the person has not had a non-intimate sample of the same type and from the same part of the body taken in the course of the investigation of the offence by the police; or
- c) the previous non-intimate sample has proved insufficient.<sup>412</sup>

If the person is being held in custody withholds their

consent authorisation must be given by the court or an officer of sufficient ranking.<sup>413</sup> A police officer can only give authorisation if he or she has 'reasonable grounds' for suspecting the involvement of the person from whom the sample is to be taken in a recordable offence and believe that the sample will tend to confirm or disprove his or her involvement.<sup>414</sup> If non-intimate samples are taken without consent the authorisation must be confirmed in writing 'as soon as practicable'.<sup>415</sup> The person must also be informed of the reason for taking the samples, informed that it will be recorded and warned that he or she may be subject to a speculative search.<sup>416</sup>

These samples may be checked against:

- a) other samples to which the person seeking to check has access and which are held by or on behalf of anyone or more relevant law enforcement authorities or which are held in connection with or as a result of an investigation of an offence; or
- b) information derived from other samples if the information is contained in records to which the person seeking to check has access.<sup>417</sup>

### Destruction of Evidence

Where fingerprints, impressions of footwear or samples are taken from a person in connection with the investigation of an offence they may be retained after they have fulfilled the purposes for which they were taken, but shall not be used by any person except for purposes related to the prevention or detection of crime, the investigation of an offence, the conduct of a prosecution or the identification of a deceased person or of the person from whom a body part came.<sup>418</sup> These types of evidence and any copies, impressions or related electronic data that exist should be destroyed if the person is no longer suspected of committing an offence.<sup>419</sup> That is unless the person gives their consent for them to be retained.<sup>420</sup> A person can request to witness the destruction.<sup>421</sup> A certificate stating that these types of evidence have been destroyed can also be requested and must be issued within three months from the date that it was requested.<sup>422</sup>

404 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationary Office, 2014), Annex A, para 8.

405 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationary Office, 2014), Annex A, para 5.

406 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationary Office, 2014), Annex A, para 5.

407 Section 62(1A), Police and Criminal Evidence Act 1984.

408 Section 62(1A), Police and Criminal Evidence Act 1984.

409 Section 63A(1), Police and Criminal Evidence Act 1984.

410 Section 63(1), Police and Criminal Evidence Act 1984.

411 Section 63(2), Police and Criminal Evidence Act 1984.

412 Sections 63(2C) and 63(3A), Police and Criminal Evidence Act 1984.

413 Section 63(3), Police and Criminal Evidence Act 1984.

414 Section 63(4), Police and Criminal Evidence Act 1984.

415 Section 63(5), Police and Criminal Evidence Act 1984.

416 Sections 61(8A) and 61(8B), Police and Criminal Evidence Act 1984.

417 Section 63A(1), Police and Criminal Evidence Act 1984.

418 Section 64(1A), Police and Criminal Evidence Act 1984.

419 Sections 64(3) and 64(5), Police and Criminal Evidence Act 1984.

420 Section 64(3AC), Police and Criminal Evidence Act 1984.

421 Section 64(6), Police and Criminal Evidence Act 1984.

422 Section 64(6A), Police and Criminal Evidence Act 1984.

## Photographing of Suspects

A person who is detained at a police station may be photographed with the appropriate consent or without the appropriate consent if it is withheld or not practicable to obtain it.<sup>423</sup> This may require the removal of any item or substance worn on or over the whole or any part of the head or face of the person being photographed.<sup>424</sup> Only police officers are entitled to take the photograph<sup>425</sup> and a photograph includes a moving image.<sup>426</sup>

The photograph:

- a) may be used by, or disclosed to, any person for any purpose related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution or the to the enforcement of a sentence; and
- b) after being so used or disclosed, may be retained but may not be used or disclosed except for a purpose so related.<sup>427</sup>

## 9. Powers of Arrest

The powers of arrest 'must be used fairly, responsibly, with respect for people suspected of committing offences, and without unlawful discrimination'.<sup>428</sup> These powers should also not be used to discriminate against, harass or victimise any person on the grounds of the "protected characteristics" of age, disability, gender reassignment, race, religion or belief, sex and sexual orientation, marriage and civil partnership, pregnancy and maternity'.<sup>429</sup>

The use of these powers should also be used in accordance with the right to liberty and security.<sup>430</sup> The use of these powers 'must be fully justified and officers exercising the power should consider if the necessary objectives can be met by other, less intrusive means'.<sup>431</sup>

Best practice requires that two elements must be present for an arrest to be lawful. There are:

- 1) a person's involvement or suspected involvement or attempted involvement in the commission of a criminal offence; and
- 2) reasonable grounds for believing that the person's arrest is necessary.<sup>432</sup>

This requires considering the individual circumstances and taking into account:

- a) the situation of the victim;
- b) the nature of the offence;
- c) the circumstances of the suspect; and
- d) the needs of the investigative process.<sup>433</sup>

It is recommended that Kuwait consider these general principles above and the more specific examples of suggested best practice identified in the following sub-sections, in order to develop its laws and guidance on the powers of arrest.

428 UK Home Office, 'Code G Revised – Code of Practice for the Statutory Power of Arrest by Police Officers' (The Stationery Office, 2012), para 1.1.

429 UK Home Office, 'Code G Revised – Code of Practice for the Statutory Power of Arrest by Police Officers' (The Stationery Office, 2012), para 1.1.

430 Articles 29 and 31, Constitution of Kuwait 1962; Article 9, International Covenant on Civil and Political Rights 1966; Article 14, Arab Charter on Human Rights 2004.

431 UK Home Office, 'Code G Revised – Code of Practice for the Statutory Power of Arrest by Police Officers' (The Stationery Office, 2012), para 1.3.

432 UK Home Office, 'Code G Revised – Code of Practice for the Statutory Power of Arrest by Police Officers' (The Stationery Office, 2012), para 2.1.

433 UK Home Office, 'Code G Revised – Code of Practice for the Statutory Power of Arrest by Police Officers' (The Stationery Office, 2012), para 2.8.

423 Section 64A(1), Police and Criminal Evidence Act 1984.

424 Section 64A(2), Police and Criminal Evidence Act 1984.

425 Section 64A(3), Police and Criminal Evidence Act 1984.

426 Section 64A(6A), Police and Criminal Evidence Act 1984.

427 Section 64A(4), Police and Criminal Evidence Act 1984.



## Arrest without Warrant: Police Officers

A police officer may arrest without warrant:

- a) anyone who is about to commit an offence;<sup>434</sup>
- b) anyone who is in the act of committing an offence;<sup>435</sup>
- c) anyone whom he or she has reasonable grounds for suspecting to be about to commit an offence;<sup>436</sup>
- d) anyone whom he or she has reasonable grounds for suspecting to be committing an offence;<sup>437</sup> or
- e) anyone whom he or she has reasonable grounds for suspecting to be guilty of committing an offence.<sup>438</sup>

An arrest without warrant will only be made if the arresting officer has reasonable and objective grounds to believe that the arrest is necessary to obtain:

- a) the name of the person in question;
- b) the address of the person in question;
- c) to prevent the person in question from
  - i) causing physical injury to himself or herself or any other person;
  - ii) suffering physical injury;
  - iii) causing loss or damage to property;
  - iv) committing an offence against public decency, if the members of the public going about their normal business cannot reasonably be expected to avoid the person in question; or
  - v) causing an unlawful obstruction of the highway.
- d) to protect a child or other vulnerable person from the person in question;
- e) to allow the prompt and effective investigation of the offence or of the conduct of the person in question; or
- f) to prevent any prosecution for the offence from being hindered by the disappearance of the person in question.<sup>439</sup>

<sup>434</sup> Section 24(1), Police and Criminal Evidence Act 1984.

<sup>435</sup> Section 24(1), Police and Criminal Evidence Act 1984.

<sup>436</sup> Section 24(1), Police and Criminal Evidence Act 1984.

<sup>437</sup> Section 24(1), Police and Criminal Evidence Act 1984.

<sup>438</sup> Section 24(2), Police and Criminal Evidence Act 1984.

<sup>439</sup> Sections 24(5) and 24(6), Police and Criminal Evidence Act 1984; UK Home Office, 'Code G Revised – Code of Practice for the Statutory Power of Arrest by Police Officers' (The Stationery Office, 2012), para 2.3A.

## Arrest without Warrant: Other Persons

A person other than a police officer may arrest without a warrant:

- a) anyone who is in the act of committing an indictable offence;
- b) anyone whom he or she has reasonable grounds for suspecting to be committing an indictable offence;
- c) anyone who is guilty of an indictable offence; or
- d) anyone whom he or she has reasonable grounds for suspecting to be guilty of an indictable offence.<sup>440</sup>

This is only if the person making the arrest has 'reasonable grounds' to believe that any of the listed scenarios are applicable and that it is 'necessary' to arrest the person in question.<sup>441</sup> Or, if it 'appears to the person making the arrest, that it is not reasonably practicable for a police officer' to make the arrest instead.<sup>442</sup> This must be with a view to preventing the person in question from:

- a) causing physical injury to himself or herself or any other person;
- b) suffering physical injury;
- c) causing loss of or damage to property; or
- d) making off before a police officer can assume responsibility for him or her.<sup>443</sup>

### Information to be given on Arrest

The person being arrested should be informed that he or she is under arrest 'as soon as is practicable' after the arrest.<sup>444</sup> The person should also be informed of the grounds for the arrest 'as soon as is practicable' after the arrest.<sup>445</sup> This applies regardless of whether the fact of the arrest and its grounds are 'obvious'.<sup>446</sup>

The suggested caution to be given is as follows:

...you are under arrest. You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in Court. Anything you do say may be given in evidence.<sup>447</sup>

<sup>440</sup> Sections 24A(1) and 24A(2), Police and Criminal Evidence Act 1984.

<sup>441</sup> Section 24(3)(a), Police and Criminal Evidence Act 1984.

<sup>442</sup> Section 24(3)(b), Police and Criminal Evidence Act 1984.

<sup>443</sup> Section 24(4), Police and Criminal Evidence Act 1984.

<sup>444</sup> Sections 28(1) and 28(5), Police and Criminal Evidence Act 1984.

<sup>445</sup> Section 28(3), Police and Criminal Evidence Act 1984.

<sup>446</sup> Sections 28(2) and 28(4), Police and Criminal Evidence Act 1984.

<sup>447</sup> UK Home Office, 'Code G Revised – Code of Practice for the Statutory Power of Arrest by Police Officers' (The Stationery Office, 2012), para 3.5.



## Voluntary Attendance at Police Station

If a person attends a police station voluntarily for the purpose of assisting an investigation he or she shall be entitled to leave at will, unless placed under arrest.<sup>448</sup> Once placed under arrest he or she shall be informed at once of his or her arrest and that he or she prevented from leaving at will.<sup>449</sup>

## Arrest Elsewhere than a Police Station

If a person is arrested elsewhere than a police station, he or she shall be taken by a police officer to a police station 'as soon as practicable after the arrest'.<sup>450</sup> This should be a designated police station, if it is not the person under arrest should be transferred to the appropriate police station within six hours of arrival, unless released.<sup>451</sup> A person can be brought to any police station if the arresting police officer requires assistance and it is not available or there is a threat of the person injuring themselves on the way to the designated police station.<sup>452</sup>

The person will not have to be brought to a police station if it appears that it may not be necessary to keep the arrested person in police detention for more than six hours.<sup>453</sup> The arrested person can be released without bail if the police officer is satisfied that there are no grounds for keeping him or her under arrest.<sup>454</sup> The person's release shall be recorded 'as soon as practicable after the release'.<sup>455</sup>

The arresting police officer can delay taking the arrested person to a police station if the officer believes it reasonable to carry out immediate investigations. If a delay occurs this must be recorded.<sup>456</sup>

## Bail

### Elsewhere than at Police Station

If a person is arrested elsewhere than a police station, a police officer may release that person on bail at any time before he or she arrives at the police station.<sup>457</sup> If the person is released in this way he or she is required to attend a police station.<sup>458</sup> The police officer shall not take

any security for the bail.<sup>459</sup> The police officer will set the conditions of the bail such as:

- a) securing that the person surrenders to custody;
- b) securing that the person does not commit an offence while on bail;
- c) securing that the person does not interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or herself or any other person;
- d) for the person's own protection or, if the person is under 17, for the person's own welfare or in the person's own interests.<sup>460</sup>

## Notices

If a police officer grants bail, the person must be given a notice in writing before he or she is released.<sup>461</sup> The notice must state:

- a) the offence for which the person was arrested;
- b) the ground for which the person was arrested;
- c) that the person is required to attend a police station, specifying which one if required;
- d) the bail conditions
- e) explain the opportunities for variation of the bail conditions.<sup>462</sup>

The person released on bail must be given notice in writing of any changes to the bail conditions.<sup>463</sup> The person released on bail is no longer required to attend a police station if he or she is given written notice to that effect.<sup>464</sup>

The person released on bail can request that the requirements for who and where to report to are varied.<sup>465</sup> The court can also order changes to the bail conditions.<sup>466</sup> If the details are changed they must be confirmed in writing to the person released on bail.<sup>467</sup>

## Failure to Answer to Bail

If the person released on bail fails to attend a specified police station at a specified time, a police officer may arrest him or her without a warrant.<sup>468</sup> The person arrested must be taken to a police station 'as soon as practicable after the arrest'.<sup>469</sup>

448 Section 29, Police and Criminal Evidence Act 1984.

449 Section 29, Police and Criminal Evidence Act 1984.

450 Section 30(1A), Police and Criminal Evidence Act 1984.

451 Section 30(6), Police and Criminal Evidence Act 1984.

452 Section 30(5), Police and Criminal Evidence Act 1984.

453 Section 30(3), Police and Criminal Evidence Act 1984.

454 Section 30(7A), Police and Criminal Evidence Act 1984.

455 Sections 30(8) and 30(9), Police and Criminal Evidence Act 1984.

456 Sections 30(10) and 30(10A), Police and Criminal Evidence Act 1984.

457 Sections 30A(1) and 30A(2), Police and Criminal Evidence Act 1984.

458 Sections 30A(2) and 30A(5), Police and Criminal Evidence Act 1984.

459 Section 30A(3A), Police and Criminal Evidence Act 1984.

460 Section 30A(3B), Police and Criminal Evidence Act 1984.

461 Section 30B(1), Police and Criminal Evidence Act 1984.

462 Sections 30B(2)-30B(4A), Police and Criminal Evidence Act 1984.

463 Section 30B(7), Police and Criminal Evidence Act 1984.

464 Section 30C(1), Police and Criminal Evidence Act 1984.

465 Section 30CA(1), Police and Criminal Evidence Act 1984.

466 Section 30CB, Police and Criminal Evidence Act 1984.

467 Section 30CA(3)(c), Police and Criminal Evidence Act 1984.

468 Section 30D(1), Police and Criminal Evidence Act 1984.

469 Section 30C(2A), Police and Criminal Evidence Act 1984.

## Arrest for Further Offence

If a person has been arrested for an offence, is at a police station in consequence of that arrest, and it appears that he or she were released that he or she would be liable for arrest for some other offence, that person shall be arrested for that other offence.<sup>470</sup>

## 10. Detention

The powers of detention 'must be used fairly, responsibly, with respect for the people whom they apply and without unlawful discrimination'.<sup>471</sup> They should also be used with 'due regard to the need to eliminate unlawful discrimination, harassment and victimisation'.<sup>472</sup> All persons in custody 'must be dealt with expeditiously, and released as soon as the need for detention no longer applies'.<sup>473</sup> The duties attached to the powers of detention must be carried out 'as soon as practicable' and any delays must be necessary and reasonable.<sup>474</sup> The person arrested must be kept informed, but this will be subject to whether they are capable of understanding, pose a violent threat or are in need of urgent medical attention.<sup>475</sup> These powers will be exercised with consideration for the arrested person's age, mental vulnerability and disability.<sup>476</sup>

It is recommended that Kuwait consider these general principles and the more specific examples of suggested best practice identified in the following sub-sections, in order to develop its laws and guidance on detention.

### Basic Rights

When a person is under arrest they have certain basic rights which can be exercised at any stage during the period of custody. These are:

- a) the right to consult privately with a solicitor and that free independent legal advice is available;
- b) the right to have someone informed of their arrest;
- c) the right to consult the Codes of Practice;
- d) if applicable, the right to interpretation and

470 Section 31, Police and Criminal Evidence Act 1984.

471 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 1.0.

472 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 1.0.

473 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 1.1.

474 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 1.1A.

475 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 1.8.

476 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), paras 1.5, 1.5A and 1.6.

translation.<sup>477</sup>

An arrested person also has the right to be informed about the offence and any further offences for which they are arrested while in custody, and the grounds for the arrest and detention.<sup>478</sup>

The detainee must be given written notice, in an accessible format, of:

- a) their rights
  - b) the arrangements for obtaining legal advice;
  - c) their right to a copy of the custody record;
  - d) their right to remain silent;
  - e) their right to have access to materials and documents which are essential to effectively challenging the lawfulness of the arrest and detention;
  - f) the maximum period for which they may be kept in police detention without charge, when detention must be reviewed and when release is required
  - g) their right to medical assistance;
  - h) their right, if prosecuted, to have access to the evidence of their case before trial; and
  - i) a list of their entitlements during custody –
- i) the provisions related to the conduct of interviews;
  - ii) the circumstances in which an appropriate adult can assist
  - iii) the reasonable standards of physical comfort
  - iv) adequate food
  - v) access to toilets and washing facilities, clothing, medical attention and exercise when practicable.<sup>479</sup>

The detainee must be given the opportunity to read the notice and shall be asked to sign the custody record to acknowledge receipt of the notice. A refusal to sign must be recorded in the custody record.<sup>480</sup> The notice must be translated orally or in writing.<sup>481</sup> The custody officer must ensure that these rights, or the opportunity to refuse them, are offered in practice.<sup>482</sup>

477 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 3.1.

478 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 3.1(b).

479 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 3.2.

480 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 3.2A.

481 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 3.12.

482 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 3.5.

The detainee shall be made aware when video cameras are in operation.<sup>483</sup>

Risk assessments must be conducted and any risks exposed appropriately responded to.<sup>484</sup> This includes reducing the opportunities to self-harm or harm others, increasing levels of monitoring or observing, and calling the appropriate healthcare professional.<sup>485</sup>

## Right to Legal Advice

All detainees must be informed that they may at any time consult and communicate privately with a solicitor, whether in person, in writing or by telephone, and that free independent legal advice is available.<sup>486</sup> No police officer should at any time do or say anything with the intention of dissuading any person from using this right.<sup>487</sup> When this right is requested the custody officer must act without delay.<sup>488</sup>

If a detainee requests this right, he or she may not be interviewed or continue to be interviewed without receiving such advice,<sup>489</sup> unless:

a) an officer of sufficient ranking has reasonable grounds for believing that the consequent delay might:

- i) lead to interference with, or harm to, evidence connected with an offence;
- ii) lead to interference with, or physical harm to, other people;
- iii) lead to serious loss of, or damage to, property;
- iv) lead to alerting other people suspected of having committed an offence but not yet arrested for it;
- v) hinder the recovery of property obtained in consequence of the commission of an offence; or
- vi) awaiting the arrival of a solicitor will

483 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 3.10.

484 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 3.6.

485 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 3.9.

486 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 6.1.

487 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 6.4.

488 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 6.5.

489 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 6.6.

'unreasonably delay' the investigation process.

b) the solicitor of the detainee nominated cannot be contacted, does not wish to be contacted, or refused to attend.

c) the detainee changed his or her mind about wanting legal advice and an officer of sufficient ranking is satisfied that the detainee has not been denied this right.<sup>490</sup>

A solicitor will only be removed from an interview if their conduct inhibits the interviewer from putting proper questions to the interviewee and the appropriate authorisation from a senior officer is given.<sup>491</sup>

The request for legal advice and action shall be recorded.<sup>492</sup>

## Detention Conditions

As far as it is practicable, not more than one detainee should be detained in each cell.<sup>493</sup> Cells in use must be adequately heated, cleaned, lit and ventilated.<sup>494</sup> Restraints will only be used where it is reasonable and necessary in the circumstances having regard to the detainee's demeanour and with a view to ensuring their safety and the safety of others.<sup>495</sup> Blankets, mattresses, pillows and other bedding supplied shall be of a reasonable standard and in a clean and sanitary condition.<sup>496</sup> Access to toilet and washing facilities must be provided.<sup>497</sup> If replacement clothing is required, it shall be of a reasonable standard of comfort and cleanliness.<sup>498</sup>

490 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 6.6.

491 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 6.11.

492 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 6.16.

493 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 8.1.

494 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 8.2.

495 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 8.2.

496 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 8.3.

497 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 8.4.

498 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 8.5.

At least two light meals and one main meal will be offered in any 24-hour period.<sup>499</sup> Drinks should be provided at meal times and upon reasonable request between meals.<sup>500</sup> As far as practicable, meals provided shall offer a varied diet and meet any specific dietary needs or religious beliefs.<sup>501</sup> A record must be kept of replacement clothing, meals offered and any restraints used.<sup>502</sup>

Detainees must be given reasonable medical care and any complaint of ill-treatment must be reported.<sup>503</sup> Detainees must be visited every hour, unless there are causes for concern.<sup>504</sup> If the detainee requires clinical attention, this must be received 'as soon as reasonably practicable'.<sup>505</sup> A record of the care received must be made.<sup>506</sup> When observing a detained person reusability, response to questions and response to commands should be considered. If the person fails to respond or appears to be injured or drowsy, an appropriate healthcare professional or ambulance must be called.<sup>507</sup>

### Limitations on Police Detention

There must be justification for why a person arrested for an offence to be kept in police detention.<sup>508</sup> It is the duty of the custody officer to release an arrested person from detention if the grounds for the detention 'cease to apply', and the custody officer is not aware of any other grounds for the continued detention, for example that he or she is unlawfully at large.<sup>509</sup> Only the custody officer linked to the authorisation of the

499 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 8.6.

500 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 8.6.

501 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 8.6.

502 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 8.9.

503 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), paras 9.1 and 9.2.

504 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 9.3.

505 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 9.5.

506 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 9.15.

507 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), Annex H.

508 Section 34(1), Police and Criminal Evidence Act 1984.

509 Sections 34(2) and 34(4), Police and Criminal Evidence Act 1984.

person's detention can release the detainee.<sup>510</sup>

A person whose release is ordered shall be released without bail unless it appears to the custody officer 'that there is a need for further investigation of any matter in connection with which he or she was detained at any time during the period of his or her detention'.<sup>511</sup> In such a case proceedings will be taken against the person who may be remanded or released on bail.<sup>512</sup>

### Designated Police Stations

There should be designated police stations where persons who are arrested are detained.<sup>513</sup> Persons who are brought to another police station after his or her arrest should be transferred to the designated police station within six hours of the arrest.<sup>514</sup> A poster advertising this right must be prominently displayed in the charging area of every police station.<sup>515</sup>

### Custody Officers at Police Station

Each designated police station should have one or more custody officer.<sup>516</sup> The custody officer should be appointed by the chief officer and be of sufficient ranking.<sup>517</sup> If the custody officer is not readily available, another officer can step in to perform the required functions temporarily.<sup>518</sup>

### Duties of Custody Officer before Charge

The duties of the custody officer should be carried out 'as soon as practicable' either after the person arrives at the police station, or after the arrest.<sup>519</sup> If a person is arrested for an offence without a warrant or under a warrant not endorsed for bail, the custody officer at each police station where he or she is detained after arrest shall determine that there is sufficient evidence to charge that person with the offence for which he or she is arrested.<sup>520</sup> The arrested person may be detained at the police station until the custody officer is able to reach this determination.<sup>521</sup>

If the custody officer determines that there is not

510 Section 34(3), Police and Criminal Evidence Act 1984.

511 Section 34(5)(a), Police and Criminal Evidence Act 1984.

512 Section 34(5)(b), Police and Criminal Evidence Act 1984.

513 Section 35, Police and Criminal Evidence Act 1984.

514 Section 30(6), Police and Criminal Evidence Act 1984.

515 UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 6.3.

516 Section 36(1), Police and Criminal Evidence Act 1984.

517 Sections 36(2), 36(2A) and 36(3), Police and Criminal Evidence Act 1984.

518 Section 36(4), Police and Criminal Evidence Act 1984.

519 Section 37(10), Police and Criminal Evidence Act 1984.

520 Section 37(1), Police and Criminal Evidence Act 1984.

521 Section 37(1), Police and Criminal Evidence Act 1984.



sufficient evidence to detain the arrested person, he or she shall be released either on or without bail, unless the custody officer has 'reasonable grounds for believing' that the person's detention without charge is 'necessary to secure or preserve evidence' relating to the offence.<sup>522</sup> In such a case the custody officer will authorise the person's detention at the police station.<sup>523</sup> However, if a sample is required from the arrested person, the custody officer can authorise the person's detention for up to 24 hours to 'enable a sample to be taken'.<sup>524</sup>

A written record of the person's detention will be made 'as soon as practicable'.<sup>525</sup> This should be written in front of the arrested person, who is to be informed of the grounds of detention.<sup>526</sup> That is unless he or she is incapable of understanding, is violent or likely to become violent, or is in urgent need of medical attention.<sup>527</sup>

If there is 'sufficient evidence' to charge the person arrested with the offence for which he or she was arrested, the custody officer decides<sup>528</sup> whether the person shall be:

- a) released without charge and on bail
- b) kept in police detention
- c) released without charge and without bail
- d) charged.<sup>529</sup>

It is the duty of custody officer to inform the arrested person when he or she is being released or detained. The custody officer should also inform the arrested person if a decision has been made to not prosecute.<sup>530</sup>

If the person arrested is 'not in a fit state to be dealt with' he or she may be kept in police detention until he or she is.<sup>531</sup>

Consultation with the Director of Public Prosecutions  
If consultation with the Director of Public Prosecutions (DPP) is required, this must be done by an officer involved in the investigation 'as soon as is practicable'.<sup>532</sup> It is the DPP's decision as to whether the person is charged or given a caution.<sup>533</sup> If a

caution has been ordered, but is not practicable, the person shall be charged.<sup>534</sup> An officer involved in the investigation must be given notice of the DPP's decision,<sup>535</sup> which must be confirmed in writing.<sup>536</sup>

## Release on Bail

The custody officer may subsequently appoint a different time, or an additional time, at which the person is to attend the police station to answer bail.<sup>537</sup> The person must be given written notice of any changes to the bail conditions by the custody officer.<sup>538</sup> On answering bail, the person can be kept in police detention to enable him or her to be dealt with.<sup>539</sup> If he or she is not in a fit state to be dealt with, the person can be kept in police detention until they are.<sup>540</sup>

If the person on bail is required to appear before a court they shall be given a date to appear as soon as practicable.<sup>541</sup>

### Duties of Custody Officer after Charge

If a person is arrested and charged for an offence, otherwise than under a warrant endorsed for bail, the custody officer shall order his or her released from police detention, either with or without bail, unless:

- a) if the arrested person is not an arrested juvenile –
- i) the custody officer cannot attain the person's name or address, or has reasonable grounds for doubting that the name or address given is real;
- ii) the custody officer has reasonable grounds for believing that the person arrested will fail to appear in court to answer bail;
- iii) and is arrested for an imprisonable offence, the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary to prevent him or her from committing an offence;
- iv) the custody officer has reasonable grounds for believing that the detention is necessary to get a required sample, but the person may only be detained for up to six hours;<sup>542</sup>

<sup>522</sup> Section 37(2), Police and Criminal Evidence Act 1984.

<sup>523</sup> Section 37(3), Police and Criminal Evidence Act 1984.

<sup>524</sup> Sections 37(8A) and 37(8B), Police and Criminal Evidence Act 1984.

<sup>525</sup> Section 37(4), Police and Criminal Evidence Act 1984.

<sup>526</sup> Section 37(5), Police and Criminal Evidence Act 1984.

<sup>527</sup> Section 37(6), Police and Criminal Evidence Act 1984.

<sup>528</sup> Section 37(7A), Police and Criminal Evidence Act 1984.

<sup>529</sup> Section 37(7), Police and Criminal Evidence Act 1984.

<sup>530</sup> Sections 37(7B) and 37(8), Police and Criminal Evidence Act 1984.

<sup>531</sup> Section 37(9), Police and Criminal Evidence Act 1984.

<sup>532</sup> Section 37B(1), Police and Criminal Evidence Act 1984.

<sup>533</sup> Sections 37B(2) and 37B(3), Police and Criminal Evidence Act

1984.

<sup>534</sup> Section 37B(8), Police and Criminal Evidence Act 1984.

<sup>535</sup> Section 37B(4), Police and Criminal Evidence Act 1984.

<sup>536</sup> Section 37B(4A), Police and Criminal Evidence Act 1984.

<sup>537</sup> Section 37D(1), Police and Criminal Evidence Act 1984.

<sup>538</sup> Section 47D(2), Police and Criminal Evidence Act 1984.

<sup>539</sup> Sections 37D(4) and 37D(4A), Police and Criminal Evidence Act 1984.

<sup>540</sup> Section 37D(5), Police and Criminal Evidence Act 1984.

<sup>541</sup> Section 47(3A), Police and Criminal Evidence Act 1984.

<sup>542</sup> Section 38(2A), Police and Criminal Evidence Act 1984.

v) and is arrested for an offence which is not an imprisonable offence, the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary to prevent him or her from causing physical injury to any other person or from causing loss of or damage to property;

vi) the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary to prevent him or her from interfering with the administration of justice or with the investigation of offences or of a particular offence; or

vii) the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary for his or her own protection.<sup>543</sup>

b) the offence with which the person is charged is murder.<sup>544</sup>

If it concerns an arrested juvenile, any of the above grounds apply if the arrested juvenile has 'attained the minimum age'.<sup>545</sup> The custody officer may also detain the juvenile if he or she believes the detention is necessary for the person's 'own protection'.<sup>546</sup> The juvenile should be moved to 'local authority accommodation', unless it is 'impracticable' to do so or, if the juvenile has attained 12 years of age, no secure accommodation is available.<sup>547</sup> If a juvenile is moved to local authority accommodation, 'it is unlawful for any person acting on behalf of the authority to detain him or her'.<sup>548</sup>

The custody officer must make a written record of the detention, including the grounds of the detention, 'as soon as practicable'.<sup>549</sup> The written record will be made in the presence of the detained, unless he or she is incapable of understanding, is violent or likely to become violent, or is in urgent need of medical attention.<sup>550</sup>

## Custody Records

A custody record must be opened as soon as practicable for each person brought to a police station under arrest or arrested at the station.<sup>551</sup> This should be kept up-to-date with each entry timed and signed.<sup>552</sup>

<sup>543</sup> Section 38(1)(a), Police and Criminal Evidence Act 1984.

<sup>544</sup> Section 38(1)(c), Police and Criminal Evidence Act 1984.

<sup>545</sup> Section 38(1)(b)(i), Police and Criminal Evidence Act 1984.

<sup>546</sup> Section 38(1)(b)(ii), Police and Criminal Evidence Act 1984.

<sup>547</sup> Section 38(6), Police and Criminal Evidence Act 1984.

<sup>548</sup> Section 38(6B), Police and Criminal Evidence Act 1984.

<sup>549</sup> Section 38(3), Police and Criminal Evidence Act 1984.

<sup>550</sup> Sections 38(4) and 38(5), Police and Criminal Evidence Act 1984.

<sup>551</sup> UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 2.1.

<sup>552</sup> UK Home Office, 'Code C Revised – Code of Practice for the

The custody officer is responsible for the custody record's accuracy and completeness.<sup>553</sup> The detainee or relevant representative shall be permitted to inspect the original custody record.<sup>554</sup> A copy of the custody record can be requested up to 12 months after release.<sup>555</sup>

## Responsibilities in Relation to Person Detained

The custody officer must ensure that:

a) all persons in police detention at that station are treated in accordance with the outlined principles; and

b) all matters relating to such persons which are required to be recorded are recorded in the custody records relating to such persons.<sup>556</sup>

If the custody officer transfers or permits the transfer of a person in police detention these duties transfer to the police officer investigating an offence for which person is detained, or to the officer who has charge of that person outside the police station.<sup>557</sup> If the person detained is subsequently returned to the custody officer, it must be confirmed that the person was treated in accordance with the above principles during this period.<sup>558</sup>

If an order is given by an officer of higher ranking than the custody officer which is not in accordance with the above principles, the matter must be referred to officer who is responsible for the police station.<sup>559</sup>

The custody officer's duty ceases if a detained juvenile is transferred to local authority accommodation.<sup>560</sup>

## Review of Police Detention

Periodic reviews of the detention of each person in police detention should be carried out.<sup>561</sup> The reviews should be as follows:

- a) the first review shall be no later than six hours after the detention was first authorised;
- b) the second review shall be not later than nine hours after the first;

Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 2.6.

<sup>553</sup> UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 2.3.

<sup>554</sup> UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), paras 2.4 and 2.5.

<sup>555</sup> UK Home Office, 'Code C Revised – Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers' (The Stationery Office, 2014), para 2.4A.

<sup>556</sup> Section 39(1), Police and Criminal Evidence Act 1984.

<sup>557</sup> Section 39(2), Police and Criminal Evidence Act 1984.

<sup>558</sup> Section 39(3), Police and Criminal Evidence Act 1984.

<sup>559</sup> Section 39(6), Police and Criminal Evidence Act 1984.

<sup>560</sup> Section 39(4), Police and Criminal Evidence Act 1984.

<sup>561</sup> Section 40(1), Police and Criminal Evidence Act 1984.



c) subsequent reviews shall be at intervals of not more than nine hours.<sup>562</sup>

A review may be carried out by means of a discussion, conducted by telephone, with one or more persons at the police station where the arrested person is held.<sup>563</sup> In such a case all of the below requirements should be carried out by an officer present in the police station where the person is held.<sup>564</sup>

A review may be postponed if, having regard to all circumstances, it is not practicable to carry out the review at that time.<sup>565</sup> This includes during questioning and if no review officer is readily available.<sup>566</sup> If a review is postponed, it shall be carried out 'as soon as practicable'.<sup>567</sup> If a review is carried out after postponement, the fact that it was so carried out shall not affect any requirement as to the time at which any subsequent review is to be carried out.<sup>568</sup> The reasons for the postponement shall be recorded by the review officer.<sup>569</sup> If a person is in detention as they were not in a fit state to be processed, it is the duty of the review officer to conduct the set reviews to determine when he or she becomes in a fit state.<sup>570</sup>

During the review the person detained (unless he or she is asleep) or solicitor shall be given the opportunity to make representations about the detention.<sup>571</sup> The solicitor may make oral or written representations. The review officer can refuse to hear oral representations from the person detained if they are not in a fit state.<sup>572</sup>

If an order is given by an officer of higher ranking than the review officer which is not in accordance with the above principles, the matter must be referred to officer who is responsible for the police station.<sup>573</sup>

### Limits on Period of Detention without Charge

In general, a person shall not be kept in police detention for more than 24 hours without charge.<sup>574</sup> The time from which the period of detention of a person is to be calculated begins the time at which the person arrives at the relevant police station or the time 24 hours after the arrest, whichever is earlier.<sup>575</sup> If the person is

arrested outside the jurisdiction, the time from which the period of detention is to be calculated is the time at which the person arrives at the first police station in the jurisdiction or the time 24 hours after the arrest, whichever is earlier.<sup>576</sup> If the person attends the police station voluntarily or accompanies a police officer to a police station without being arrested, the time to be calculated begins at the time of the arrest.<sup>577</sup> If the person who is in police detention requires medical attention and is moved to hospital, any time during which he or she is being questioned in hospital or on the way there and back to the police station for the purpose of obtaining evidence related to the offence shall be included in the calculation.<sup>578</sup>

If the person has not been charged, after the 24 hours has expired, he or she shall be released at that time either on bail or without bail,<sup>579</sup> unless the extended detention has been appropriately authorised.<sup>580</sup> The person, on release, shall not be re-arrested without a warrant for the offence for which he or she was previously arrested, unless new evidence justifying a further arrest has come to light since the release.<sup>581</sup>

### Authorisation of Continued Detention

The period of detention may be extended for up to an extra 72 hours, over two stages. The detention may be extended by 36 hours if an officer of sufficient ranking has reasonable grounds for believing that the extended detention is necessary to 'secure and preserve evidence' related to an indictable offence and that the investigation is 'being conducted diligently and expeditiously'.<sup>582</sup> The period of detention can be extended for a further 36 hours, if the reasonable grounds continue to exist.<sup>583</sup> The person arrested must be informed of the grounds for the continued detention and this must be recorded in the person's custody record.<sup>584</sup>

The authorisation for the first extension must be given before the initial period of 24 hours expires and after the second review of his or her detention.<sup>585</sup> If it is proposed that the arrested person is to be transferred from one place of police detention to another, consideration should be given to the distance and time of that the journey would take.<sup>586</sup>

Before making a determination the person detained or solicitor shall be given the opportunity to make

<sup>562</sup> Section 40(3), Police and Criminal Evidence Act 1984.

<sup>563</sup> Section 40A(1), Police and Criminal Evidence Act 1984.

<sup>564</sup> Section 40A(3), Police and Criminal Evidence Act 1984.

<sup>565</sup> Section 40(4), Police and Criminal Evidence Act 1984.

<sup>566</sup> Section 40(4)(b), Police and Criminal Evidence Act 1984.

<sup>567</sup> Section 40(5), Police and Criminal Evidence Act 1984.

<sup>568</sup> Section 40(6), Police and Criminal Evidence Act 1984.

<sup>569</sup> Section 40(7), Police and Criminal Evidence Act 1984.

<sup>570</sup> Section 40(9), Police and Criminal Evidence Act 1984.

<sup>571</sup> Section 40(12), Police and Criminal Evidence Act 1984.

<sup>572</sup> Section 40(14), Police and Criminal Evidence Act 1984.

<sup>573</sup> Section 40(11), Police and Criminal Evidence Act 1984.

<sup>574</sup> Section 41(1), Police and Criminal Evidence Act 1984.

<sup>575</sup> Section 41(2)(a), Police and Criminal Evidence Act 1984.

<sup>576</sup> Section 41(2)(b), Police and Criminal Evidence Act 1984.

<sup>577</sup> Section 41(2)(c), Police and Criminal Evidence Act 1984.

<sup>578</sup> Section 41(6), Police and Criminal Evidence Act 1984.

<sup>579</sup> Section 41(7), Police and Criminal Evidence Act 1984.

<sup>580</sup> Section 41(8), Police and Criminal Evidence Act 1984.

<sup>581</sup> Section 41(9), Police and Criminal Evidence Act 1984.

<sup>582</sup> Section 42(1), Police and Criminal Evidence Act 1984.

<sup>583</sup> Section 42(2), Police and Criminal Evidence Act 1984.

<sup>584</sup> Section 42(5), Police and Criminal Evidence Act 1984.

<sup>585</sup> Section 42(4), Police and Criminal Evidence Act 1984.

<sup>586</sup> Section 42(3), Police and Criminal Evidence Act 1984.

representations about the extended detention.<sup>587</sup> The solicitor may make oral or written representations.<sup>588</sup> The officer can refuse to hear oral representations from the person detained if they are not in a fit state.<sup>589</sup> If a person's detention is extended, he or she shall be reminded of his or her rights.<sup>590</sup>

If the person has not been charged, after the 36 hours extension has expired, he or she shall be released at that time either on bail or without bail,<sup>591</sup> unless the extended detention has been appropriately authorised.<sup>592</sup> The person, on release, shall not be re-arrested without a warrant for the offence for which he or she was previously arrested, unless new evidence justifying a further arrest has come to light since the release.<sup>593</sup>

### **Warrants of Further Detention**

A court may issue a warrant for further detention if it is satisfied that there are 'reasonable grounds' for doing so.<sup>594</sup> A warrant period is limited to 36 hours<sup>595</sup> and cannot extend beyond 96 hours since the relevant time.<sup>596</sup> The person to whom the warrant applies shall be given a copy of the information and be brought before the court for the hearing.<sup>597</sup> The information should include the nature of the offence, the general nature of the evidence, the inquiries that have been made or are proposed, and the reasons for extending the detention.<sup>598</sup> The person has a right to legal representation and the hearing may be adjourned to enable him or her to obtain representation, during which time he or she may be kept in police detention.<sup>599</sup>

The court must believe that the extended detention is necessary to 'secure and preserve evidence' related to an indictable offence and that the investigation is 'being conducted diligently and expeditiously'.<sup>600</sup> A warrant for further detention can be made before the court any time before the expiry of 36 hours after the relevant time or if it is not practicable for the court to sit then, up to 6 hours after the expiry of 36 hours.<sup>601</sup> Otherwise the court can dismiss the application or adjourn the

hearing for up to 36 hours, during which time the arrested person can be kept in police detention.<sup>602</sup> Any warrant of extension must be recorded.<sup>603</sup>

If the person has not been charged, after the warrant extension has expired, he or she shall be released at that time either on bail or without bail.<sup>604</sup> The person, on release, shall not be re-arrested without a warrant for the offence for which he or she was previously arrested, unless new evidence justifying a further arrest has come to light since the release.<sup>605</sup>

### **Use of Video-conferencing Facilities for Decisions about Detention**

In exceptional circumstances decisions about detention may be made with the use of video-conferencing facilities.<sup>606</sup> The decision reached will be recorded.<sup>607</sup> The arrested person or solicitor may make representations about the detention.<sup>608</sup>

### **Detention after Charge**

A person that is charged with an offence and, after the being charged, is kept in police detention or is detained by a local authority, shall be brought before a court.<sup>609</sup> This shall be done 'as soon as practicable' and within the first sitting of the court after the person is charged.<sup>610</sup>

### **Persons Granted Live Link Bail**

An accused person who attends a police station to answer to live link bail is not to be treated as in police detention.<sup>611</sup> A person who fails to attend a live link bail and is brought to a police station is to be treated as if he or she had been arrested for and charged with the offence in connection with which he or she was granted bail, and as if he or she had been so charged at the time he or she was brought to the station.<sup>612</sup>

**Power of Arrest for Failure to Answer to Police Bail**  
A police officer may arrest without a warrant any person who, having released on bail, fails to attend the designated police station at the appointed time.<sup>613</sup> This includes a person who has attended the police station,

587 Section 42(6), Police and Criminal Evidence Act 1984.

588 Section 42(7), Police and Criminal Evidence Act 1984.

589 Section 42(8), Police and Criminal Evidence Act 1984.

590 Section 42(9), Police and Criminal Evidence Act 1984.

591 Section 42(10), Police and Criminal Evidence Act 1984.

592 Section 42(10), Police and Criminal Evidence Act 1984.

593 Section 42(11), Police and Criminal Evidence Act 1984.

594 Section 43(1), Police and Criminal Evidence Act 1984.

595 Section 43(12), Police and Criminal Evidence Act 1984.

596 Section 44(3)(b), Police and Criminal Evidence Act 1984.

597 Section 43(2), Police and Criminal Evidence Act 1984.

598 Section 43(14), Police and Criminal Evidence Act 1984.

599 Section 43(3), Police and Criminal Evidence Act 1984.

600 Section 43(4), Police and Criminal Evidence Act 1984.

601 Section 43(5), Police and Criminal Evidence Act 1984.

602 Sections 43(7), 43(8) and 43(9), Police and Criminal Evidence Act 1984.

603 Section 43(10), Police and Criminal Evidence Act 1984.

604 Section 43(18), Police and Criminal Evidence Act 1984.

605 Section 43(19), Police and Criminal Evidence Act 1984.

606 Section 45A(1), Police and Criminal Evidence Act 1984.

607 Section 45A(5), Police and Criminal Evidence Act 1984.

608 Section 45A(6), Police and Criminal Evidence Act 1984.

609 Section 46(1), Police and Criminal Evidence Act 1984.

610 Sections 46(2) and 46(3), Police and Criminal Evidence Act 1984.

611 Section 46ZA(2), Police and Criminal Evidence Act 1984.

612 Section 46ZA(5), Police and Criminal Evidence Act 1984.

613 Section 46A(1), Police and Criminal Evidence Act 1984.

but leaves before the completion of the proceedings or refuses to be searched.<sup>614</sup> A police officer may also arrest without warrant a person who has been released on bail and there are reasonable grounds for suspecting that the person has broken the bail conditions.<sup>615</sup> A person arrested for these reasons shall be taken to the designated police station as soon as practicable after the arrest.<sup>616</sup>

## Records of Detention

Each police force shall keep written records on an annual basis of:

- a) the number of persons kept in police detention for more than 24 hours and subsequently released without charge;
- b) the number of applications for warrants of further detention and the results of the application; and
- c) in relation to each warrant of further detention
  - i) the period of further detention authorised by it;
  - ii) the period which the person named in it spent in police detention on its authority; and
  - iii) whether he was charged or released without charge.<sup>617</sup>

## Scrutiny of the Authorities

In the interests of promoting fair procedures international best practice identifies that it is important to introduce and maintain mechanisms for scrutinising the relevant authorities. Effective scrutiny requires both internal and external monitoring, complaints and review mechanisms. Internal mechanisms enable monitoring of police officers and for concerns or complaints to be reported to their superiors. For scrutiny to be effective it also requires that the complaints or serious concerns are effectively investigated and remedies are provided where required. External mechanisms are independent bodies who deal with serious cases of police misconduct and appeals against decisions from internal decisions. The UK provides an example of best practice in this regard. It has established an Independent Police Complaints Commission (IPCC)<sup>618</sup> and Surveillance Commissioner.<sup>619</sup> The role of these Commissions is not only to investigate matters, but also to issue guidance.<sup>620</sup>

614 Sections 46A(1ZA) and 46A(1ZB), Police and Criminal Evidence Act 1984.

615 Section 46A(1), Police and Criminal Evidence Act 1984.

616 Section 46A(2), Police and Criminal Evidence Act 1984.

617 Section 50, Police and Criminal Evidence Act 1984.

618 Part 2, Police Reform Act 2002.

619 Part IV, Regulation of Investigatory Powers Act 2000.

620 Sections 22-24, Police Reform Act 2002; Sections 71 and 72, Regulation of Investigatory Powers Act 2000.

## 11. Legal Proceedings

The right to a fair trial is protected by Article 34 of the Constitution of Kuwait, Article 14 of the ICCPR and Article 13 of the Arab Charter. It 'serves as a procedural means to safeguard the rule of law' and aims to ensure 'the proper administration of justice'.<sup>621</sup> The right to a fair trial extends to civilian, military and religious tribunals.<sup>622</sup> Many of the elements contained within this right are reflected in Kuwait's criminal justice system through its penal codes. These codes broadly protect a defendant's right to a lawyer,<sup>623</sup> right to silence,<sup>624</sup> right of access to court<sup>625</sup> and right to appeal.<sup>626</sup> This section develops these concepts and makes suggestions as to how these rights can be guaranteed in practice by following international best practice on the right to a fair trial.

It should be noted that particular threats to the right to a fair trial, and therefore examples of bad practice, include:

- a) exclusion of the public, the accused or their representative from the proceedings;
- b) restrictions of the right to a lawyer of the accused's own choice;
- c) severe restrictions or denial of the accused's right to communicate with their lawyers, particularly when held incommunicado;
- d) threats to lawyers;
- e) inadequate time for preparation of the case;
- f) severe restrictions or denial of the right to summon and examine or have examined witnesses; and
- g) the use of anonymous judges.<sup>627</sup>

It is recommended that Kuwait consider these general principles and the more specific examples of suggested best practice identified in the following sub-sections, in order to develop its laws and guidance on effective legal proceedings.

621 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial)', 23 August 2007, para 2.

622 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial)', 23 August 2007, paras 22 and 24.

623 Article 74 and 98, Law No 17, Penal Proceedings and Trial Code 1960.

624 Article 98, Law No 17, Penal Proceedings and Trial Code 1960.

625 Article 141, Law No 17, Penal Proceedings and Trial Code 1960.

626 Articles 199-213, Law No 17, Penal Proceedings and Trial Code 1960.

627 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial)', 23 August 2007, para 23.

## Equality of Arms

Equality of arms 'ensures that the parties to the proceedings in question are treated without any discrimination'.<sup>628</sup> It ensures that every party is afforded 'a reasonable opportunity to present his or her case in conditions that do not place him or her at substantial disadvantage vis-à-vis his or her opponent'.<sup>629</sup> By doing so it prevents 'substantial procedural imbalance between the parties'.<sup>630</sup> It requires that 'the same procedural rights are provided to all parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant'.<sup>631</sup> This may require the free assistance of an interpreter, if a party 'could not participate in the proceedings on equal terms or witnesses produced by it to be examined'.<sup>632</sup>

## Right to an Adversarial Trial

The accused has a right to an adversarial trial. This is where the prosecution and defence are 'given the opportunity to have knowledge and comment on the observations filed and the evidence adduced by the other party'.<sup>633</sup>

## Access to Justice

Access to justice requires that 'no individual is deprived, in procedural terms, of his or her right to claim justice'.<sup>634</sup> This extends to not only citizens, but also 'all individuals, regardless of nationality or statelessness, or whatever their status, whether asylum seekers, refugees, migrant workers, unaccompanied children or other persons, who may find themselves in the territory or subject to' Kuwait's jurisdiction.<sup>635</sup>

Any situation in which an individual attempts to access the competent courts or tribunals and these are 'systematically frustrated de jure or de facto' violates the right to a fair trial.<sup>636</sup> Any distinctions regarding access to courts and tribunals 'that are not based on law and cannot be justified on objective and reasonable grounds', are prohibited under the right to a fair trial.<sup>637</sup> Therefore, it is prohibited to bar a person from bring a suit against other persons by reason of 'their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.<sup>638</sup>

## Legal Assistance

Legal assistance for criminal proceedings must be provided.<sup>639</sup> The fees for legal assistance should not prevent access to justice.<sup>640</sup> International best practice suggests that free legal aid should be offered for individuals who do not have sufficient means to pay for legal assistance.<sup>641</sup> Domestic criminal justice systems are obliged to give free legal aid for individual's seeking to make an application for constitutional review of a death penalty on the basis of irregularities at criminal trial.<sup>642</sup>

This includes the right for the accused to communicate with their counsel. The accused must be given 'prompt access' to counsel and without undue delay.<sup>643</sup>

The counsel should be able to meet their clients 'in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications'.<sup>644</sup> Lawyers should also be able to represent their clients in accordance with professional

628 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 8.

629 John Jackson and Sarah Summers, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (Cambridge University Press, 2012), 83.

630 John Jackson and Sarah Summers, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (Cambridge University Press, 2012), 84.

631 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 13.

632 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 13.

633 John Jackson and Sarah Summers, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (Cambridge University Press, 2012), 86.

634 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 9.

635 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 9.

636 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 9.

637 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 9.

638 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 9.

639 Article 14, International Covenant on Civil and Political Rights 1966; CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 10.

640 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 11.

641 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 10.

642 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 10.

643 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, paras 34 and 35.

644 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 34.



ethics 'without restrictions, influence, pressure or undue influence'.<sup>645</sup>

## Independent and Impartial Tribunal

A tribunal must be 'established by law' and 'independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature'.<sup>646</sup> The requirement that a tribunal is competent, independent and impartial is 'an absolute right that is not subject to any exception'.<sup>647</sup>

Independence refers to:

...the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature.<sup>648</sup>

This requires taking specific measures to guarantee the independence of the judiciary and protecting judges from any form of political influence in their decision-making. This can be achieved through 'the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them'.<sup>649</sup> It also requires protecting the status of judges (term of office, age of retirement, conditions of service etc) through law.<sup>650</sup> The judiciary should be protected against conflicts of interest and intimidation.<sup>651</sup> They should only be dismissed on serious grounds of misconduct or incompetence, in accordance with fair procedures set out in law, which

645 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 34.

646 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 18.

647 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 19.

648 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 19.

649 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 19.

650 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 19.

651 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 19.

ensure objectivity and impartiality.<sup>652</sup>

Impartiality can be judged ensuring that:

1) the judge was not influenced by personal bias or prejudice, nor harboured preconceptions about the particular case before them, nor acted in ways that improperly promoted the interests of one party at the detriment of the other; and

2) the tribunal appears to be impartial to a reasonable observer.<sup>653</sup>

## Fair Hearing

A fair hearing requires 'the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and whatever motive'.<sup>654</sup> A hearing is not fair if 'the defendant in the criminal proceedings is faced with the expression of a hostile attitude from the public or support for one party in the courtroom that is tolerated by the court' or if the jury expresses racist attitudes or bias that is tolerated by the court.<sup>655</sup> This violates the right to defence.<sup>656</sup>

A fair hearing also requires that the hearing is expeditious.<sup>657</sup> Delays cannot be justified by the complexity of the case or the behaviour of the parties.<sup>658</sup> If the delays are due to a lack of resources and chronic under-funding, steps should be taken to address these issues to the 'extent possible'.<sup>659</sup>

## Public Hearing

All criminal trials must be conducted orally and publicly.<sup>660</sup>

652 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 20.

653 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 21.

654 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 25.

655 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 25.

656 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 25.

657 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 37.

658 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 27.

659 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 27.

660 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 28.

This ensures transparency and ‘provides an important safeguard for the interest of the individual and society at large’.<sup>661</sup> Information about the time and venue must be available to the public and adequate facilities for the attendance of interested members of the public, within reasonable limits, must be provided.<sup>662</sup> This requirement does not necessarily extend to all pre-trial and appellate proceedings.<sup>663</sup>

The public is the general public.<sup>664</sup> This includes members of the media and must not be limited to a particular category of people.<sup>665</sup> The court does have the power to exclude the public for:

...reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice.<sup>666</sup>

In cases where the public have been excluded, the judgment must be made public.<sup>667</sup> This includes the essential findings, evidence and legal reasoning.<sup>668</sup> There may be exceptions to this if the case concerns juvenile persons, matrimonial disputes or guardianship.<sup>669</sup>

## Presumption of Innocence

Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law.<sup>670</sup> This:

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661 CCPR/C/GC/32, ‘General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial’, 23 August 2007, para 28.

662 CCPR/C/GC/32, ‘General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial’, 23 August 2007, para 28.

663 CCPR/C/GC/32, ‘General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial’, 23 August 2007, para 28.

664 CCPR/C/GC/32, ‘General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial’, 23 August 2007, para 29.

665 CCPR/C/GC/32, ‘General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial’, 23 August 2007, para 29.

666 CCPR/C/GC/32, ‘General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial’, 23 August 2007, para 29.

667 CCPR/C/GC/32, ‘General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial’, 23 August 2007, para 29.

668 CCPR/C/GC/32, ‘General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial’, 23 August 2007, para 29.

669 CCPR/C/GC/32, ‘General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial’, 23 August 2007, para 29.

670 Article 14(2), International Covenant on Civil and Political Rights 1966; CCPR/C/GC/32, ‘General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial’, 23 August

...imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle.<sup>671</sup>

This requires that:

a) all public authorities refrain from ‘prejudging the outcome of the trial’;

b) that defendants are not shackled or kept in cages during trials or otherwise presented to the court in a manner indicating that they may be dangerous criminals;

c) the media avoids news coverage undermining the presumption of innocence;

d) the length of the pre-trial detention is not taken as an indication of guilt and its degree;

e) the denial of bail does not affect the presumption of innocence.<sup>672</sup>

## Notification of Charge

All persons charged with a criminal offence should be informed promptly and in detail in a language which they understand of the nature and cause of the criminal charge brought against them.<sup>673</sup> This applies to all criminal charges, including those of persons not in detention.<sup>674</sup> The information can be given orally, but must be confirmed in writing.<sup>675</sup> The person arrested must be given notification of the reasons for an arrest.<sup>676</sup> In case of trials in absentia, all due steps must be taken to inform the accused of the charges and to notify them of the proceedings.<sup>677</sup>

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2007, para 30.

671 CCPR/C/GC/32, ‘General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial’, 23 August 2007, para 30.

672 CCPR/C/GC/32, ‘General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial’, 23 August 2007, para 30.

673 Article 14(3)(a), International Covenant on Civil and Political Rights 1966; CCPR/C/GC/32, ‘General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial’, 23 August 2007, para 31.

674 CCPR/C/GC/32, ‘General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial’, 23 August 2007, para 31.

675 CCPR/C/GC/32, ‘General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial’, 23 August 2007, para 31.

676 Article 9(2), International Covenant on Civil and Political Rights 1966.

677 CCPR/C/GC/32, ‘General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial’, 23 August 2007, para 31.



## Adequate Time and Facilities for Defence

The accused must have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing.<sup>678</sup> If required, an interpreter should be provided during the pre-trial and trial stages.<sup>679</sup> The determination of “adequate time” depends on the circumstances. If the counsel reasonably feels that they have had inadequate time to prepare a defence, it is their responsibility to request an adjournment of the trial.<sup>680</sup> Reasonable requests for an adjournment should be granted.<sup>681</sup> The requirement of “adequate facilities” includes access to documents and other evidence. This includes all materials that the prosecution plans to offer in court against the accused or that are exculpatory (could assist the defence).<sup>682</sup> If the accused would otherwise require an interpreter, it may be sufficient for their counsel to have access to the relevant documents.<sup>683</sup>

## Detention during Trial

The detention during trial should ‘not last longer than necessary in the circumstances of the specific case’.<sup>684</sup> This extends from the formal charging of the accused to the final judgment on appeal and all stages must take place ‘without undue delay’.<sup>685</sup> The detention must be reasonable, which is determined by the circumstances.<sup>686</sup> This requires taking into account ‘the complexity of the case, the conduct of the accused, and the manner in which the matter was dealt with by the administrative and judicial authorities’.<sup>687</sup>

678 Article 9(3)(b), International Covenant on Civil and Political Rights 1966; CCPR/C/GC/32, ‘General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial’, 23 August 2007, para 32.

679 CCPR/C/GC/32, ‘General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial’, 23 August 2007, para 32.

680 CCPR/C/GC/32, ‘General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial’, 23 August 2007, para 32.

681 CCPR/C/GC/32, ‘General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial’, 23 August 2007, para 32.

682 CCPR/C/GC/32, ‘General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial’, 23 August 2007, para 32.

683 CCPR/C/GC/32, ‘General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial’, 23 August 2007, para 33.

684 CCPR/C/GC/32, ‘General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial’, 23 August 2007, para 35.

685 CCPR/C/GC/32, ‘General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial’, 23 August 2007, para 35.

686 CCPR/C/GC/32, ‘General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial’, 23 August 2007, para 35.

687 CCPR/C/GC/32, ‘General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial’, 23 August 2007, para 35.

## Accused Defence Rights

The accused has the right to be present during their trial.<sup>688</sup> This right may be waived by the accused, but the necessary steps must be taken to summon the accused in ‘a timely manner’ and ‘to inform them beforehand about the date and place of their trial and to request their attendance’.<sup>689</sup>

The accused has the right to defend themselves in person or through legal counsel of their own choosing.<sup>690</sup> They must be informed of this right.<sup>691</sup> The right to defend yourself is not an absolute right, it can be denied in the interests of justice if there is an ‘objective and sufficiently serious purpose’.<sup>692</sup> Where this right cannot be guaranteed legal representation should be offered.<sup>693</sup> Legal counsel can also be assigned if the gravity of the offence and the interest of justice require it, for example cases concerning capital punishment.<sup>694</sup>

## Examination of Witnesses

The accused has the right to examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them.<sup>695</sup> This does not provide an unlimited right to obtain the attendance of any witness requested by the accused or their counsel. It is the right to have witnesses admitted that are relevant for the defence, and to be given a proper opportunity to question and challenge witnesses against them at some stages of the proceedings.<sup>696</sup>

688 Article 14(3)(d), International Covenant on Civil and Political Rights 1966; CCPR/C/GC/32, ‘General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial’, 23 August 2007, para 36.

689 CCPR/C/GC/32, ‘General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial’, 23 August 2007, para 36.

690 Article 14(3)(d), International Covenant on Civil and Political Rights 1966; CCPR/C/GC/32, ‘General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial’, 23 August 2007, para 37.

691 CCPR/C/GC/32, ‘General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial’, 23 August 2007, para 37.

692 CCPR/C/GC/32, ‘General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial’, 23 August 2007, para 37.

693 CCPR/C/GC/32, ‘General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial’, 23 August 2007, para 37.

694 Article 14(3)(d), International Covenant on Civil and Political Rights 1966; CCPR/C/GC/32, ‘General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial’, 23 August 2007, para 37.

695 Article 14(3)(e), International Covenant on Civil and Political Rights 1966; CCPR/C/GC/32, ‘General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial’, 23 August 2007, para 39.

696 CCPR/C/GC/32, ‘General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial’, 23 August 2007, para 39.

## Right to an Interpreter

The accused has a right to have free assistance of an interpreter if the accused cannot understand or speak the language used in court.<sup>697</sup> This right arises at all stages of the oral proceedings. It applies to aliens and nationals, but the accused is not entitled to an interpreter if they know the official language of the court sufficient to defend themselves effectively.<sup>698</sup>

## Right to Privilege Against Self-incrimination

The accused has a right not to be compelled to testify against themselves or to confess guilt.<sup>699</sup> This privilege does not allow adverse inferences to be drawn from the defendant's silence.<sup>700</sup>

## Evidence through Torture or Ill-Treatment

Evidence or a confession obtained through torture or ill-treatment should be excluded from the evidence, except if such material is used as evidence that torture or other prohibited treatment occurred. In such cases, the burden is on the State to prove that statements made by the accused have been given of their own free will.<sup>701</sup>

## Juvenile Persons

If the accused is a juvenile, criminal procedures should take into account the age and desirability of promoting the juvenile person's rehabilitation.<sup>702</sup> Accused juveniles also need special protection. Unless it is considered not to be in the best interest of the child, in particular taking into account their age or situation:

- a) they should be informed directly of the charges against them and, if appropriate, through their parents and legal guardians;
- b) they should be provided with appropriate assistance in preparation and presentation of their defence;

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2007, para 39.

697 Article 14(3)(f), International Covenant on Civil and Political Rights 1966; CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 40.

698 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 40.

699 Article 14(3)(g), International Covenant on Civil and Political Rights 1966; CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 41.

700 Jixi Zhang, 'Fair Trial Rights in ICCPR' (2009) 2(4) Journal of Politics and Law 39, 42.

701 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 41; Section 76(2), Police and Criminal Evidence Act 1984.

702 Article 14(4), International Covenant on Civil and Political Rights 1966; CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 42.

c) they should be tried as soon as possible in a fair hearing in the presence of legal counsel, other appropriate assistance and their parents or legal guardian.<sup>703</sup>

Detention of juveniles before and during the trial should be avoided to the extent possible.<sup>704</sup> A minimum age for criminal liability should be established, which takes into account physical and mental immaturity.<sup>705</sup> Where possible, the rehabilitation of juveniles through means other than criminal proceedings should be considered.<sup>706</sup>

## Right to Appeal

Convicted persons have a right to appeal.<sup>707</sup> This means that anyone convicted of a crime shall have the right to have their conviction and sentence reviewed by a higher tribunal according to law.<sup>708</sup> This right is threatened if:

- a) the decision of the court of first instance is final;<sup>709</sup>
- b) following an acquittal by a lower court, the court of appeal imposes a conviction and this conviction cannot be reviewed by a higher court;<sup>710</sup> and
- c) if the defendant is not informed of the intention of their counsel not to put any arguments to the court, thereby depriving them of the opportunity to seek alternative representation.<sup>711</sup>

A review that is 'limited to the formal or legal aspects of the conviction without any consideration whatsoever of the facts is not sufficient'. There is a duty to 'review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case'.<sup>712</sup> This does not

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703 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 41.

704 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 41.

705 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 43.

706 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 44.

707 Article 14(5), International Covenant on Civil and Political Rights 1966.

708 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 45.

709 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 47.

710 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 47.

711 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 51.

712 CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right

require a full retrial or hearing if the tribunal carrying out the review can 'look at the factual dimensions of the case'.<sup>713</sup>

#### Right to Reasoned Judgment

A convicted person has the right to have 'access to a duly reasoned, written judgment of the trial court' and to other documents (such as transcripts) necessary to enjoy the effective exercise of the right to appeal.<sup>714</sup> This right is impaired if the review by the higher instance court is 'unduly delayed'.<sup>715</sup>

### Compensation in Cases of Miscarriage of Justice

Compensation shall be paid to persons who have been convicted of a criminal offence by a final decision and have suffered punishment as a consequence of such a conviction, if they conviction has been reversed or they have been pardoned on the ground that new or newly discovered fact shows conclusively that there has been a miscarriage of justice.<sup>716</sup>

### Ne Bis In Idem

No one shall be liable to be tried or punished again for an offence of which they have already been fully convicted or acquitted in accordance with the law and penal procedure.<sup>717</sup> This does not prohibit the retrial of a person convicted in absentia who requests it.<sup>718</sup> It does prohibit bringing a person, once convicted or acquitted of a certain offence, either before the same court again or before another tribunal again for the same offence, for example someone acquitted by a civilian court cannot be tried against for the same offence by a military or special tribunal.<sup>719</sup>

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to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 48.

<sup>713</sup> CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 48.

<sup>714</sup> CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 49.

<sup>715</sup> CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 49.

<sup>716</sup> Article 14(6), International Covenant on Civil and Political Rights 1966; CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 52.

<sup>717</sup> Article 14(7), International Covenant on Civil and Political Rights 1966.

<sup>718</sup> CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 54.

<sup>719</sup> CCPR/C/GC/32, 'General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial', 23 August 2007, para 54.



### Boardroom Interviews – Defence Lawyers

Your client is accused of being involved in the following incident:

#### Scenario Outline:

*The time of the incident was 12.20 Friday 02 June 2015  
A serious assault on male at the entrance to the Abiaja Shopping Mall has been reported to local police.*

*Your client is accused of being one of two males who attacked the injured party and in the process caused serious knife wounds to his face and hands, what appears to be a broken jaw, and severe blood staining to his dishdisha, in addition the pavement where the attack took place was heavily bloodstained'*

*Your client and the second male were reported as being dressed in European cloths and after the assault ran to a white 4x4 vehicle in the car park got into the vehicle and drove off at speed. It is reported that they appeared to have dropped a bloodstained knife and a piece of clothing as they were getting into the vehicle. On the way out of the car park entrance they collided with another vehicle before speeding of.*

*At 2.35 an ambulance arrived and took the injured man to hospital. A police traffic patrol was on the scene within minutes and was later joined by four other police; one of whom was a police First Lieutenant. The Public Prosecutors office was notified on his arrival and attended within 20 minutes of the call.*

**Questions:**

1. What actions would you expect the first responders to the scene to have taken?
2. What records of these actions would you expect the first responders to have made?
3. What evidence would you expect to find in the prosecutors report to inform you of the incident; actions taken and justifications for prosecution examination of the facts?

The following were included to be used to prompt discussion!

- a. The actions of the first responders to secure the scene?*
- b. Photographic evidence or maps of the crime scene?*
- c. Information relation to the activities of crime scene investigators?*
- d. Information from forensic science specialist*







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